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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 651.

FRANK HAGUE, Individually and as Mayor of Jersey City, DANIEL J. CASEY, Individually and as Director of Public Safety of Jersey City, HARRY WALSH, Individually and as Chief of Police of Jersey City, and THE BOARD OF COMMISSIONERS OF JERSEY CITY,

Petitioners,

vs.

COMMITTEE FOR INDUSTRIAL ORGANIZATION, STEEL WORKERS ORGANIZING COMMITTEE OF THE COMMITTEE FOR INDUSTRIAL ORGANIZATION, UNITED ELECTRICAL RADIO AND MACHINE WORKERS OF AMERICA, UNITED RUBBER WORKERS OF AMERICA, WILLIAM J. CARNEY, WILLIAM J. TRAYNOR, WILLIAM P. McGINN, SAMUEL MACRI, JAMES P. SWEENEY, DANIEL J. FOLEY and AMERICAN CIVIL LIBERTIES UNION,

Respondents.

BRIEF ON BEHALF OF PETITIONERS.

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Respondents.

BRIEF ON BEHALF OF PETITIONERS.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court for the District of New Jersey is reported in 25 Fed. Supp. 127 and will be found at page 72, Vol. 1 of the Record; the opinion of the Circuit Court of Appeals for the Third Circuit has not yet been reported but will be found in Vol. IV, p. 101 of the Record.

JURISDICTION AND ALLOWANCE OF WRIT OF CERTIORARI.

This Court's jurisdiction is invoked under Act of Congress, February 13, 1925, c. 229, Section 1, 43 Stat. 938, (28 U. S. C. Sec. 347a) Judicial Code Sec. 240a.

The petition for issuance of the writ of certiorari was filed on February 6, 1939 and was granted by the Court on the same day.

STATEMENT OF THE CASE.

(a) Parties, Nature of the Proceedings and Abstract of Decree.

The petitioners, who were the defendants below, are Frank Hague, individually and as Mayor of Jersey City, Daniel Casey, individually and as Director of Public Safety of Jersey City, Harry Walsh, individually and as Chief of Police of Jersey City, and the Board of Commissioners of Jersey City.

The respondents, who were the plaintiffs below, are Committee for Industrial Organization, (referred to as the C.I.O.), Steel Workers Organizing Committee of the Committee of Industrial Organization, United Electrical Radio and Machine Workers of America, United Rubber Workers of America, William J. Carney, William J. Traynor, William P. McGinn, Samuel Macri, James P. Sweeney, Daniel J. Foley and American Civil Liberties Union.

This is an equity proceeding in which a decree was made by the United States District Court for the District of New Jersey by which the petitioners were enjoined from (R., Vol. I, p. 155)—

(A) 1. Excluding or removing respondents or those acting in sympathy with them from the city of Jersey City;

2. Exercising any personal restraint over the respondents or persons acting in sympathy with them, except in so far as such personal restraint is in accordance with any right of search and seizure and any right of arrest and removal as speedily as is reasonably possible before a judicial officer under existing law;

3. Interfering with said respondents or their agents in their right to free access or locomotion on the public streets of Jersey City, except in so far as such interference is in accordance with any right of search and seizure and any right of arrest and removal as speedily as is reasonably possible before a judicial officer under existing law;

(B) 1. Interfering with said respondents or their agents in their right to communicate their thoughts to other persons on the public streets of Jersey City;

2. Interfering with said respondents in the circulation or distribution on the public streets of Jersey City of circulars, leaflets or hand bills;

3. Interfering with said respondents in the carrying or displaying of placards, signs or other printed matter.

4. (a) Interfering with their holding of meetings in the open air and in parks except when in reasonable conflict with the public recreational purposes of said parks;

(b) Withholding protection for said meetings;

(c) Continuing their expressed refusal to grant permits to certain named individuals;

(d) Refusing permits for public meetings on the public streets of Jersey City unless and until all street meetings are forbidden; subject to petitioners' reasonable interpretation of the easement of traffic.

5. Aiding or abetting in any manner whatsoever any person to commit or attempt to commit any of the things enjoined by said decree or not to do anything required to be done.

On appeal to the Circuit Court of Appeals for the Third Circuit, that Court modified the decree by eliminating from paragraph B4(d), hereinabove digested, the condition which made the operation of the injunction in respect to street meetings dependent upon the continued failure of petitioners to forbid meetings of any kind on behalf of any persons on the public streets and places of Jersey City. The judgment of affirmance of the decree, as modified, was by a divided court (R., Vol. IV, pp. 101, 141).

(b) Abstract of Pleadings.

The respondents, who are four labor unions, all unincorporated associations, the American Civil Liberties Union, which describes itself as a membership corporation, and six individuals, members of, and field representatives for the C.I.O., filed their bill of complaint in the United States District Court for the District of New Jersey, alleging that on various occasions several of their constitutional rights had

been infringed upon and interfered with by the petitioners. The causes of action set forth in the complaint and the charges made therein are numerous and do not apply with equal force to all the parties plaintiff.

The complaint contains the usual formal allegation to the effect that the suit is of a civil nature in equity arising under the Constitution and Laws of the United States and that the amount in controversy exceeds $3,000, exclusive of interest and costs. It is further alleged as a ground of jurisdiction, in the language of Judicial Code, Sec. 24 (14) (Tit. 28 U. S. C., Section 41 (14)) that the suit is "to redress the deprivation, under color of state law, statute and ordinance, of rights, privileges and immunities secured by the Constitution of the United States and of rights secured by laws of the United States providing for equal rights of citizens of the United States and of all persons within the jurisdiction of the United States".

The complaint charges that the petitioners, acting under the instruction and domination of petitioner, Frank Hague, denied to all of the respondents the right to hold meetings in Jersey City, pursuant to an ordinance adopted January 21, 1920. This ordinance relates to indoor meetings in halls and was not dealt with by the Trial Judge in his opinion or decree and therefore is immaterial to the issues involved here.

Respondents further charge a plan and conspiracy on the part of the petitioners which resulted in a policy adopted by them and directed at all of the respondents, whereby hall-owners in Jersey City have been intimidated, with the result that halls to be used as meeting places are made unavailable to the re-

spondents. The Trial Court found that the evidence in the case did not sustain this charge and made no decree thereon.

Further charge is made that the petitioners, in furtherance of an alleged plan and conspiracy, have refused to permit picketing in cases of labor disputes. This charge refers to the respondent C.I.O. and the other labor unions associated with it. The Court did not pass upon this charge and therefore it is not material to the present issue.

Next, respondents, C.I.O. and its affiliates, allege that the petitioners, acting under an ordinance forbidding the distribution of circulars, leaflets or other printed matter upon the streets of Jersey City, interfered with persons engaged in that work, confiscated their pamphlets and transported certain individual respondents, and others, outside of the city limits. Some of the distributors were arrested for violating the ordinance or for violation of the state law against unlawful assembly.

Further complaint is made that, acting under an ordinance which was adopted by the City of Jersey City on April 15, 1930, which ordinance prohibits meetings in streets and public places without a permit from the Director of Public Safety, who is empowered to refuse a permit when, after investigation of all the facts and circumstances pertinent to the same, he concludes that to grant a permit would result in riot, disturbances and disorderly assemblage, the petitioners refused to grant such permits to the respondents, C.I.O. and American Civil Liberties Union. It is further alleged that this ordinance is unconstitutional, and that petitioners discriminated against respondents in the application of the ordinance. This is the allegation which the Trial Court and the Circuit Court of Appeals dealt with at length

in their respective opinions, and forms the basis for the most important provision in the decree.

Respondents further accuse the petitioners of violating the due process and the equal protection clauses of the United States Constitution, the National Labor Relations Act and the Civil Rights Act of the United States and seek an injunction restraining the petitioners from doing any of the acts complained of.

Petitioners' answer denies the allegations of the complaint which charge them either with violation of law, a conspiracy, or activities in connection therewith, and all other material charges of the bill referring to alleged conduct of the petitioners upon which injunctive relief was sought to be predicated. Denial is also made that the ordinances referred to in the complaint are unconstitutional. The petitioners further specifically deny the allegations of the bill to the effect that the suit was one arising under the Constitution and laws of the United States and that the amount in controversy exceeded $3,000, exclusive of interest and costs, and also deny the allegation that the suit was one to redress the deprivation, under color of state law, of rights, privileges and immunities secured by the Constitution of the United States, and of rights secured by laws of the United States providing for equal rights of citizens and of all persons within the jurisdiction of the United States.

By separate defenses the answer alleges that the respondents have an adequate, complete and speedy remedy at law, that the action of the respondents in invading the city (on November 29, 1937) involved violations of existing law and was for the purpose of intimidating the city authorities and to create disorder, confusion and riot, and that respondents by

virtue of their own unlawful acts have precluded themselves from the right to relief, if any existed. The answer further asserts that the grounds set forth in the complaint, which purport to give the United States District Court jurisdiction, are frivolous in that the amount in controversy as to each respondent and each petitioner does not exceed $3,000, exclusive of interest and costs, and that no facts are alleged which show or make it appear that any real or substantial federal question is involved. Petitioners further allege that the only question of law involved is the alleged unconstitutionality of the several ordinances referred to in the complaint.

By an amendment to the answer the petitioners say that respondents are not entitled to equitable relief because they came into court with unclean hands, in that, instead of resorting to the orderly process of law, they took the law into their own hands, disregarding the ordinances of the city, violating the same, causing disorder in the community and creating a situation fraught with grave danger, unrest and damage to its citizens and their property. By a further amendment, the petitioners state that their refusal to issue permits for meetings on the public streets was a proper exercise of their power, that all the facts and circumstances in connection with the applications for permits were investigated and that the permits were denied because, as evidenced by numerous protests of citizens of the City, the holding of public meetings on the streets by the applicants would have resulted in riots, disturbances and disorderly assemblage. Petitioners further stated that the constitutionality of the ordinance with regard to holding meetings on the public streets and parks in Jersey City was at that time being reviewed by the New Jersey Supreme Court in the case of

Thomas v. *Casey*, 121 N. J. L. 185 and that said Court had complete jurisdiction to determine the questions involved, so that, as to that subject-matter, the respondents had a complete and adequate remedy in the New Jersey courts.

At the conclusion of the trial, petitioners moved before the Trial Court, *inter alia*, to dismiss the bill of complaint for lack of jurisdiction in the Court over the subject-matter of the suit. This motion was denied.

(c) Statement of Facts.

The petitioner Frank Hague is the Mayor of Jersey City. He has held that position for the past twenty-one years, and for four years prior thereto was the Director of Public Safety (R., Vol. II, p. 1030). During these twenty-five years, Jersey City has been peculiarly free from crime, disorder and unrest (R., Vol. III, p. 1322). The city has a reputation of being a moral and clean city (R., Vol. II, p. 1135) with little or no labor difficulty (R., Vol. III, p. 1159). Nor was the question of free speech ever raised in Jersey City prior to the controversy which led up to these proceedings (R., Vol. II, pp. 1115, 1124). The trouble started at the time of the seamen's strike when Harry Bridges, a noted Communist, ordered five hundred "strong-arm" men to come to Jersey City for the purpose of organizing a strike of the maritime workers (R., Vol. II, p. 1039). The respondent American Civil Liberties Union participated in these activities by sending their representatives, one of whom was Arthur Garfield Hayes, to picket the shipping industries in the city (R., Vol. II, p. 1068).

At about this time, Bridges, who had previously

been identified with the American Federation of Labor, started an independent union of his own which became affiliated with the C.I.O. (R., Vol. III, p. 1158). This strike is important because it marks the beginning of the efforts of fomenters of disorder to disrupt the peaceful relationship existing between employers and employees in Jersey City, and it further marks the initial effort on the part of the American Civil Liberties Union to aid these persons in the accomplishment of their designs.

After the settlement of the seamen's strike in the early part of 1937, conditions in Jersey City were not disturbed for some months. During the balance of that year, however, there appeared in the newspapers of the country many news items concerning sit-down strikes in various parts of the country carried on under the auspices of the C.I.O., many of which were attended by riots and violence. At the same time numerous articles were published by the newspapers concerning the domination of the activities of the C.I.O. by communists (Exhs. D-17—D-26 inclusive. R., Vol. IV).

On November 23, 1937, the Newark Evening News published an item which caused grave concern to the Jersey City authorities (Exh. D-15, R., Vol. IV). The article in question carried the following headline in bold type—

> "C.I.O. Prepared for Invasion—Mass Drive by Three Thousand to Be Launched Monday in Jersey City."

Similar articles appeared in other newspapers. These publications were occasioned by a statement made by William Carney, Regional Director of the C.I.O. in New Jersey, one of the respondents herein, in which

he outlined his plan for initiating a C.I.O. drive on the industries of the city. The articles stated that aside from field representatives and organizers of international unions, more than 2800 volunteers would distribute leaflets in one of the important industrial areas of the city; of that number more than 2000 would come from the International Maritime Union; and that the Civil Liberties Union, International Labor Defense, Workers Defense League and the Hudson County Committee for Civil Rights would also participate (Exh. D-15, R., Vol. IV).

The municipal authorities were greatly concerned with these announcements because they interpreted them as a concerted attempt by the respondents to disrupt the peaceful relationship which had continuously existed between industry and labor, and as a threat to create in Jersey City, riots and violence similar to those which had been experienced in Detroit and other cities where the C.I.O. had been active. Necessary precautionary measures were taken to prevent disorder (R., Vol. II, p. 1099).

The threat contained in the statement attributed to Carney was not an idle one. At five-thirty in the morning of November 29, 1937, the day mentioned as the date for the invasion, several hundred persons representing the C.I.O. and the other organizations mentioned in the newspaper article, congregated at the C.I.O. headquarters in Jersey City, 76 Montgomery Street, for the purpose of carrying out the plans announced by Carney. They left the C.I.O. headquarters, many of them carrying circulars and leaflets, for the purpose of distributing them to the workers as they entered the factories (R., Vol. I, p. 173). At that time there was in force in Jersey City an ordinance (Schedule B—Complaint, R., Vol. I, p. 22),

which prohibited the distribution of circulars upon the streets of the City. The police, exercising their best judgment as to how to deal with this situation, which was fraught with danger (R., Vol. I, p. 551), arrested some of the participants, and took possession of their circulars. Others were escorted from the scene of their activities in order to obviate any danger of injury either to them or to the residents of the city (R., Vol. II, p. 757).

Realizing that the authorities of Jersey City were determined to prevent the grave disorders which had been a part of the C.I.O. strikes throughout the country during 1937, the respondents adopted a new method of attack. An ordinance of Jersey City entitled "An Ordinance to Preserve Public Peace and Good Order and to Prevent Riots, Disturbances and Disorderly Assemblage", adopted April 15, 1930 (Schedule E—Complaint, R., Vol. I, p. 26),[1] requires a permit for the holding of any meetings on the streets or public places of the city. The ordinance provides that application for a permit must be presented at least three days prior to the proposed outdoor meeting. The Director of Public Safety is given the authority to grant the permits. He is also authorized to refuse to issue a permit when, after an investigation of the facts and circumstances pertinent to said application, he believes it would be proper to refuse the issuance thereof, provided, however, that the said permit shall only be refused for the purpose of preventing riots, disturbances or disorderly assemblage.

The record discloses that for the past twenty-five years during which time Mayor Hague has been connected with the government of Jersey City, thousands of permits for open air meetings have been granted

[1] See Appendix A.

(Exh. P-10 for Id., R., Vol. IV). All religious groups and associations were given permits during those years and proponents of every known political party and belief (including communists) were allowed to speak upon the public streets without the slightest hindrance, even to the extent of permitting one of the most violent political antagonists of the Mayor, to speak under the very window of the Mayor's home (R., Vol. II, p. 1077). During all these years only two applications were denied—one dated August 1, 1932, and the other,—August 26, 1933 (Exh. P-10 for Id., R., Vol. IV).

Within a short time after the abortive attempt to invade the city, an application for a permit to hold an open air meeting was made on behalf of the respondent, American Civil Liberties Union (Schedule F—Complaint, R., Vol. I, p. 27). The proposed speakers at this meeting were Morris L. Ernst, Congressmen Jerry O'Connell, Maury Maverick, and Allen. At approximately the same time, an application for another outdoor meeting was made by the respondent C.I.O. at which the speakers were to be Congressman Jerry O'Connell, Roger N. Baldwin, William J. Carney, Al. Barkin, Sam Macri and John Kiesler (Schedule F—Complaint, R., Vol. I, p. 27). These applications, and the few others to which reference will be made later, were denied because of the following facts and circumstances.

At about this time the newspapers quoted from a speech by Morris L. Ernst which he made in addressing the Lawyers' Guild in Washington, as follows:

> "You can write all the statutes you please, but if a Mayor like Hague can tear them up, you must go on a new tack. So far there has been no evidence of machine guns and I hope there will

be none because I know we would be playing into the hands of Mayor Hague."

This speech was given wide publicity in the newspapers, and the headline in a Jersey City paper (Exh. D-1, R., Vol. IV), contained these words in very bold type:

"C.I.O. Leader Talks of Machine Guns."

The newspapers also published the fact that Congressman O'Connell toured Spain as the guest of the Communist party (R., Vol. II, p. 796).

By this time the citizens of Jersey City were thoroughly aroused at the prospect of radicals and communists being permitted to use the public streets of Jersey City as a forum. The temper of the people was made known by the adoption of resolutions by such organizations as the Jersey City Chamber of Commerce, representing the business and industrial interests of the entire city (R., Vol. II, p. 821); Association of the Sons of Poland, representing sixteen thousand members (R., Vol. II, pp. 818-820); Catholic War Veterans (Exh. P-19 for Id., R., Vol. IV); Jersey City Lions Club (Exh. P-19 for Id., R., Vol. IV); Jersey City Real Estate Board (Exh. P-19 for Id., R., Vol. IV); Ladies of the Grand Army of the Republic (Exh. P-19 for Id., R., Vol. IV); and the Italian War Veterans (Exh. P-22 for Id., R., Vol. IV). Meetings of veterans were held for the voicing of similar protests. On January 6, 1938, a great mass meeting was held in the Jersey City Armory under the auspices of the Chamber of Commerce. It was attended by upwards of forty thousand people (R., Vol. II, p. 816). It unanimously endorsed the position which the governing body had

taken with respect to the preservation of order in the city, and protested against the granting of permits for outdoor meetings to the respondents (R., Vol. II, p. 821). These meetings, the resolutions and protests clearly indicated the attitude of the people of Jersey City, and were facts and circumstances of which the Director of Public Safety was bound to take notice and consider in passing on applications for street meetings (R., Vol. II, pp. 814-817).

Soon after the denial of the applications of the American Civil Liberties Union and the C.I.O., the bill of complaint was filed in this case. Although the bill was filed on January 7, 1938, the Court permitted testimony with regard to the denial of several other permits, applications for which were made in April and May, 1938. In April, 1938, one William Tallman, on behalf of the Socialist Party and Norman Thomas, made application for an open air meeting to be held on April 30, 1938, the day on which May Day was celebrated. The application was denied upon the ground that to grant the permit would result in serious riot, disturbances and disorderly assemblage. In reaching his conclusion, the Director of Public Safety considered, among other things, numerous protests from veterans and others, calling upon him to deny the application (Exh. P-20 for Id., R., Vol. IV). As a matter of fact, this application was withdrawn (R., Vol. II, p. 795). On the afternoon of April 30, 1938, an incident of importance occurred. Norman Thomas was photographed at the May Day celebration in Madison Square Park, New York City, in the act of singing what the newspapers described as the Internationale, and giving what the newspapers referred to as the Communist salute (Exh. D-16, R., Vol. IV). Thomas came to Jersey City on April

30, 1938, in spite of the fact that the application had been withdrawn after its denial by the defendant Casey, and defied the authorities by attempting to make a speech at Journal Square without a permit. Upon this occasion, a large crowd congregated at what is the busiest public square in the city (R., Vol. I, pp. 406, 444). He was not permitted to speak and was escorted to a place of safety. Representatives of the respondents seized upon this occasion as another opportunity to distribute leaflets and circulars. Because of the attendant disorder, the circulars in the possession of two of the distributors were taken from them by the police.

Thomas made another application on May 17, 1938, for a permit to hold an open air meeting. Further protests were received by the petitioners. The veterans caused the photograph of Thomas, singing the Internationale and giving the clenched fist salute of the Communist party to be broadcast throughout the city (R., Vol. III, p. 1359 and Exh. P-29 for Id., R., Vol. IV), clearly indicating the resentment of the members of these organizations. Again the Director of Public Safety made his investigation of all the facts and circumstances pertinent to the application, and based thereon, denied it. The denial of this permit was tested by Mr. Thomas in a direct proceeding brought by him in the New Jersey Supreme Court, seeking a peremptory writ of mandamus to compel the Director to issue a permit to him. In that proceeding he urged that the ordinance was unconstitutional and that the Director was guilty of an abuse of discretion (Exhs. D-28, D-29, R., Vol. IV). The New Jersey Supreme Court squarely decided the question and held that the ordinance was constitutional; that it was a valid exercise of the police power

vested in the municipality, and that there was no abuse of discretion on the part of the Director in denying the application. The opinion is reported in 121 N. J. L. 185.

Three or four other applications were denied at or about this time, all upon similar grounds. Among them were two applications made on behalf of Congressman Jerry O'Connell—one for a meeting to be held at Journal Square on May 7, 1938, and the other for a meeting to be held at Pershing Field on May 27, 1938. On both occasions a tremendous and menacing crowd of people appeared at the places announced for the meetings (R., Vol. I, p. 466). On May 7th, O'Connell failed to appear. On this occasion representatives of the respondents attempted to distribute circulars, but because of the confusion and disorder (R., Vol. I, p. 467) engendered thereby, the police prevented three or four persons from doing so. On May 27th, O'Connell appeared at Pershing Field in accordance with his announced intention to hold a meeting without a permit. He was not permitted to speak and was removed to a place of safety, a police station, under a police escort.

The testimony further discloses that on January 17, 1931, a report was presented to Congress by a special committee appointed to investigate communistic activities in the United States, referred to in the record as the Fish Report. This report specifically deals with the American Civil Liberties Union, the Garland Fund, and the International Labor Defense. It contains excerpts from the testimony of Roger Baldwin, the directing head of the American Civil Liberties Union, as well as from the testimony of William Z. Foster, the then head of the Communist Party (Exh. D-27, R., Vol. IV). It characterizes the American

Civil Liberties Union as a subversive communistic organization and states that fully 90 per cent of its efforts are on behalf of communists who have come into conflict with the law; that its main function is to attempt to protect communists in their advocacy of force and violence to overthrow the government, replacing the American flag by the red flag, and erecting a Soviet government in place of the republican form of government guaranteed to each state by the Federal Constitution. The Garland Fund (the financial report of which was offered as Exh. D-10, R., Vol. IV) is described in this report as having helped to keep alive, by financial assistance, the American Civil Liberties Union, the International Labor Defense, the Daily Worker, and many other communistic and ultra-radical organizations and publications. The International Labor Defense, which organization sent its representatives to participate in Carney's invasion of Jersey City of November 29, 1937, is described in the report as a communistic organization to defend classwar prisoners; that it provides legal aid to all communists arrested for revolutionary activities, and helps to secure bail for them.

The quoted testimony of Roger Baldwin in this report upholds the right of a citizen or alien to advocate murder, assassination, force or violence in the overthrow of government. Foster's testimony conclusively proves that the Communist Party advocates the demolition and destruction of religion, the confiscation of all private property, the overthrow of our government by revolutionary methods, and the fact that its members look to Soviet Russia as their country, and the Soviet red flag as their flag.

Morris Ernst, who was scheduled as a speaker in the application of the American Civil Liberties Union, is

a director of that Union and treasurer of the Garland Fund (Exh. D-10, R., Vol. IV). Norman Thomas and Roger Baldwin are also directors of the American Civil Liberties Union and the Garland Fund (Exh. D-10, R., Vol. IV). The Garland Fund was the owner of a publication known as the New Masses. This appears from the affidavit of ownership which was published in New Masses (R., Vol. III, pp. 1437-1438; Exh. D-11, R., Vol. IV). The New Masses is a publication concerning which the Trial Court made this comment:

> "The Court: I think we are willing to concede that the New Masses advocates doctrines which, as you say, will shock a Christian gentleman. I don't think there is any doubt about that." (R., Vol. III, p. 1435.)

So much for the denial of applications for street meetings. In addition, the respondents sought to substantiate their charge that the police interfered with the carrying of placards. To do so, they produced only one witness, David Silverstein, whose testimony relates to one isolated case, long before the filing of the present bill, and that interference was the subject of a suit in equity to enjoin the police (R., Vol. I, p. 261). There is no other proof in this case relating to interference with the carrying of placards.

Respondents have also endeavored to produce proof concerning the charge that automobiles were stopped and the occupants subjected to illegal search and seizure. In this entire record only two instances of stopping cars have been described. One was the automobile of Jules Nydes in the early morning of November 29, 1937 (R., Vol. I, pp. 344-345), the day of the invasion, upon which occasion circulars were taken by the police (R., Vol. I, p. 347). The other was the

stopping of the automobile of Samuel Macri, who was riding with one Thomas Cometa, on October 28, 1937, upon one of the streets in lower Jersey City (R., Vol. I, p. 501). The car bore foreign license plates and excited the suspicion of the policeman on that thoroughfare. After satisfactory explanation the occupants were permitted to proceed (R., Vol. I, p. 511).

Finally, respondents attempted to prove that the petitioners enforced the city ordinance prohibiting the distribution of circulars on the streets after the decision of the Supreme Court of the United States in *Lovell* v. *City of Griffin*, 303 U. S. 444. This decision was announced on March 28, 1938. The witness, Grace Milgrim, testified on behalf of the respondents that she attempted to distribute circulars on March 29th and 31st, 1938, and was prevented from so doing, but that on April 1st when she again attempted to distribute circulars, she was unmolested (R., Vol. I, p. 419). Manifestly, the city authorities required a reasonable time to secure and examine a copy of this Court's opinion, and to promulgate appropriate police instructions with reference thereto. The fact that three days after the filing of the opinion, the city authorities did not interfere with the distribution of circulars on the streets is a complete answer to the charge that the decision of the Supreme Court was disregarded.

Respondents also called as witnesses the petitioners, Frank Hague, Mayor of Jersey City, and Daniel Casey, Director of Public Safety. They admitted the confiscation of circulars and leaflets and the removal of some persons from the scene of their activities on the few occasions testified to, but they clearly described the unusual circumstances which

made such action necessary. They also testified as to the denial of the permits for outdoor meetings involved in this case and carefully explained the reasons for refusing to grant the same. They, however, were chiefly interrogated with reference to their policies, opinions and "philosophy" under hypothetical situations which never had any basis in fact.

An examination of the testimony of all the witnesses whom the respondents produced at the trial of the issues in this case, discloses: (1) twelve witnesses testified to the occurrences on November 29, 1937, in the early hours of the morning, which was the date of the invasion; (2) five witnesses testified concerning the happenings on April 30, 1938, the occasion when Norman Thomas came to Jersey City to speak at Journal Square, a permit for which was denied to him; (3) four witnesses testified concerning the occurrences on May 7, 1938, at which time a tremendous gathering was present to await Congressman O'Connell, who announced he was coming to Jersey City to make a speech, although a permit had been denied to him; (4) one witness testified to the incident on May 27, 1938, the meeting at which Congressman O'Connell appeared at Pershing Field for the purpose of making an open air speech without a permit; (5) one witness testified to her attempt to distribute circulars on the streets of Jersey City on March 29 and March 31, within three days after the *Griffin* decision, but admitted that on April 1, 1938, she was permitted to distribute them without any molestation; (6) three witnesses testified to the stopping of an automobile on two occasions—one on the early morning of November 29, 1937, the day of the invasion, and the other on October 28, 1937, when a car with a foreign license plate was stopped

by a policeman whose suspicions were aroused, but permitted to proceed; (7) one witness testified to the destruction of placards upon one occasion.

It will thus be noted that on most, if not all of the occasions with reference to which the petitioners have been accused of violating the rights of the respondents, the stage was set and the situations created by the respondents themselves, none of whom was a resident of Jersey City.

It is upon this testimony, and this testimony alone, that the drastic decree of the District Court and the affirmance thereof by the Circuit Court of Appeals, as modified, was based.

(d) Statement of Issues Herein.

Under the decree entered by the District Court, the ordinance entitled "An Ordinance to Preserve Public Peace and Good Order and to Prevent Riots, Disturbances and Disorderly Assemblages" (Schedule E-Complaint R., Vol. I, p. 26) was held unconstitutional only to the extent of its discriminatory enforcement by petitioners, as to meetings on streets. As to meetings in public parks, the ordinance was held void on its face. The modification of the decree by the Circuit Court of Appeals, extended the scope of the decree by making the right to use both the public streets and parks for meetings and assemblies an absolute one, thereby holding the ordinance unconstitutional on its face. The injunction as entered by the Circuit Court, now requires, both as to public parks and streets, that petitioners allow any persons who apply therefor three days in advance, the right to hold meetings and assemblies, regardless of the judgment of the Director of Public Safety of Jersey City, as to the possibility of ensuing riots, disturbances, and

disorderly assemblages, annoyance to and interference with residents on streets where such meetings might be held, or the interference with the right of the general public to relax in and enjoy the facilities of the parks, undisturbed by such mass meetings and assemblies.

Except to the extent that it will be shown hereinafter that the Courts below were utterly without any jurisdiction over the subject matter of the bill of complaint filed, within the provisions of the Judicial Code, *petitioners do not take issue, on this appeal,* with those provisions of the decree of injunction, as entered, dealing with exclusions or removals of respondents from Jersey City, the exercise of unlawful restraint, or the interference by petitioners with the rights of respondents to free access or locomotion on the public streets of the city, their right to communicate their thoughts to other persons on the streets, or their right to circulate or distribute circulars or other literature. Although a portion of the record below dealt with the enforcement by petitioners of a 1924 ordinance of the city forbidding the distribution of circulars on the streets[2] (R., Vol. I, p. 22), the city has not attempted to prevent such distribution since the holding by this Court in *Lovell v. City of Griffin,* 303 U. S. 444, that such prohibition, when absolute and without relation to the end of preventing disorder or littering of the streets, is

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[2] This ordinance was held valid by the New Jersey Supreme Court in *Coughlin, et al.* v. *Sullivan,* 100 N. J. L. 42. Petitioners accordingly enforced it until, subsequent to the filing of the bill of complaint herein, this Court decided the *Lovell* case, *infra.* Since that decision, petitioners have not attempted to prevent the distribution of circulars, as stated in the context, in spite of apparent and significant differences between the Jersey City ordinance and that condemned in the *Lovell* case.

in violation of the 14th Amendment. The position of petitioners in this regard was definitely stated during the trial of the case and at the argument before the Circuit Court of Appeals.

Aside from the question of jurisdiction, the only substantial issues between the parties on this appeal, to which the argument of petitioners will be limited herein, concern the effect of the decree in abridging the right and duty of the municipal officials of Jersey City to control its public streets and other public places, and to require persons and organizations seeking to exercise the privilege of conducting mass assemblies and making public addresses in and upon such public streets and places, to obtain a permit therefor from the municipal officer in charge, he being authorized to refuse such permit under circumstances specified in the applicable ordinance. Respondents have in the Courts below beclouded and prejudiced a dispassionate consideration of these latter issues by dwelling at length upon the facts and circumstances upon which the provisions of the decree dealing with exclusions and unlawful restraints are based. Petitioners have strictly limited the issues herein, as recited, in order that the true and only presently subsisting issues between the parties, concerning street and park meetings and assemblies, be considered and determined by this Court on their merits, unaffected by extraneous matters. The analysis of all of the testimony, as hereinabove set forth, is presented simply for the purpose of presenting the entire picture of the controversy to the Court. The question of the constitutionality of municipal regulations concerning the use of streets and public places for mass meetings and assemblies, and its effect, if any, upon the funda-

mental rights of free speech and peaceful assembly, is of vital importance, not only to the parties to these proceedings, but to the governing officials of municipalities throughout the country, and the limitation of the issues as herein expressed by petitioners, is in the interest of their permanent and sound adjudication, undistorted by any obtrusion of questions relating to civil liberties generally, which, as petitioners have shown, are not presently in issue.

Although petitioners are earnestly interested in a conclusive determination by this Court of the meritorious questions involved, they regard it as their duty and obligation to further argue the question relating to the absence of original jurisdiction in the courts below over the subject matter of the several complaints. It is respectfully submitted that an insistence by this Court of orderly adherence to rules and statutes concerning procedure and jurisdiction, on the part of persons seeking to litigate questions of constitutional rights, is as important an end, as the adjudication of the nature and extent of the rights in question.

SPECIFICATIONS OF ERRORS URGED.

The Circuit Court of Appeals erred:—

1. In holding that the Jersey City street meeting ordinance adopted April 15, 1930 is unconstitutional on its face as repugnant to the due process clause of the Fourteenth Amendment.

2. In holding that the said ordinance has been administered in an unconstitutional or discriminatory manner.

3. In failing to reverse the decree of injunction as entered in the District Court on the ground that same is vague and uncertain, and impracticable of enforcement by the Court or of compliance by petitioners.

4. In holding that jurisdiction over all or some of the causes of action laid in the bill of complaint was properly assumed by the District Court under Judicial Code, Section 24 (1), Act of Congress, Mar. 3, 1911, c. 231, Sec. 24, 36 Stat. 1091.

5. In holding that jurisdiction over all or some of the causes of action laid in the bill of complaint was properly assumed by the District Court under Judicial Code, Section 24 (14), Act of Cong. cit. *supra*, 36 Stat. 1092.

Summary of Argument.

POINT I—Under the law of New Jersey no one has the right to hold a public meeting in the streets or public places of a municipality without the consent of the local authorities. It having been held by this Court in *Davis* v. *Commonwealth*, 167 U. S. 43, that such a law does not conflict with the federal constitution, the Jersey City ordinance which restricts the right to speak in such places under certain conditions, is necessarily valid. The ordinance has been legally enforced in this case.

POINT II. The injunction entered below is defective because vague, uncertain and impracticable of enforcement by the Court or of compliance by petitioners.

POINT III. The District Court was not invested with jurisdiction of the subject matter of the bill of complaint.

ARGUMENT.

POINT I.

Under the law of New Jersey no one has the right to hold a public meeting in the streets or public places of a municipality without the consent of the local authorities. It having been held by this Court in *Davis* v. *Commonwealth*, 167 U. S. 43, that such a law does not conflict with the federal constitution, the Jersey City ordinance which restricts the right to speak in such places under certain conditions, is necessarily valid. The ordinance has been legally enforced in this case.

It has been settled by the decision of this Court in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, that the federal courts are bound to apply the local law of the state as expressed by its statutes and the decisions of its courts unless such law is in conflict with any provision of the federal constitution or its amendments.

It is the law of New Jersey, as expressed by the Court of Errors and Appeals in *Harwood* v. *Trembley*, 97 N. J. L. 173, that no one is justified in delivering an address in the public streets without a permit from the municipal officials charged with the control of such streets and public places. It is also the law of New Jersey as set forth in *Thomas* v. *Casey*, 121 N. J. L. 185, that the street meeting ordinance of the City of Jersey City involved in this case, which gives to the Director of Public Safety the right to deny a permit for a meeting on the streets or public places, if in his opinion the granting of such a permit would lead to riot, disturbances or disorderly assemblages, is a valid and constitutional exercise of the police powers, under

a proper delegation of legislative authority. The petitioners submit, therefore, that these decisions of the New Jersey courts are binding upon this Court, unless it is found that the law as therein settled, violates some provision of the federal constitution. This Court has held, however, in *Davis* v. *Commonwealth,* 167 U. S. 43, that a municipal ordinance requiring the issuance of permits for the purpose of holding meetings in public places, issuable in the discretion of the municipal authorities, without any standard being set up in the ordinance itself as to the manner in which that discretion should be exercised, does not violate any provision of the federal constitution or its amendments. It necessarily follows that the Jersey City ordinance, which limits the discretion of the municipal authorities in passing upon the application for such meetings, cannot be held to be violative of the federal constitution. The law of New Jersey as expressed in the foregoing decisions, therefore, is binding upon this Court in this case.

(a) The Statute and Case Law of New Jersey.

It is well established that the state has the absolute power to control the use of streets and public places for the benefit of the public at large. Where such right has been delegated to a municipality, such municipality has similar power, *Commonwealth* v. *Davis,* 162 Mass. 510, aff'd *Davis* v. *Commonwealth,* 167 U. S. 43.

The degree of control over streets and public places which resides in municipalities in New Jersey, depends upon the extent of the power in that regard delegated by the State Legislature. The pertinent legislation in New Jersey is as follows:

By New Jersey Revised Statutes of 1937, Sec.

40:48-1,[3] the legislature delegated to the governing body of every municipality power to make, amend, repeal and enforce ordinances to "preserve the public peace and order, to prevent and quell riots, disturbances and disorderly assemblages".

Under Section 40:67-1,[4] the further power is delegated to "prescribe the time, manner in which, and terms upon which, persons shall exercise any privileges granted to them in the use of any street, highway or public place * * *"

Section 40:61-1[5] deals with the regulation of public parks and playgrounds by municipalities. It is provided that any municipality may acquire property for park purposes and may construct and maintain pavilions, recreation piers, lakes and ponds, may provide music, and may lease any portion thereof for a period not exceeding five years, if not presently needed, and may rent or lease resort or recreational concessions to the highest bidder under specified regulations. Under *West* v. *Monmouth Beach*, 107 N. J. L. 445; it is held to be the law of New Jersey that a municipality may not subject its park property to any use not strictly in accordance with the statute. The municipality is further given, under Sec. 40:61-1, *supra*, the express right to, "by ordinance make and enforce rules and regulations for the government, use and policing of all such public parks, open spaces, playgrounds, beaches, waterfronts and places for public resort and recreation and to provide penalties for violation thereof * * *".

It is manifest that the preservation of the public peace and order and the prevention and quelling of

[3] See Appendix B.
[4] See Appendix B.
[5] See Appendix C.

riots, disturbances and disorderly assemblages are within the police powers reserved by the states and never delegated to the Federal Government. It is likewise clear that the Legislature had the undoubted right to delegate this power to the several municipalities. Pursuant to this delegation of power, the petitioner, Board of Commissioners of the City of Jersey City, governing body of the City of Jersey City, adopted the ordinance entitled, "An Ordinance to preserve public peace and good order, and to prevent riots, disturbances and disorderly assemblages", which is set forth as Schedule E, annexed to the Bill of Complaint (R., Vol. I, p. 26). The ordinance provides in effect that no public parades or public assembly in or upon the public streets, highways, public parks or public buildings of the city shall take place or be conducted until a permit shall have been obtained from the Director of Public Safety. The Director of Public Safety is authorized to grant a permit for parades and public assemblages upon application made to him at least three days prior to the proposed parade or assembly, and he is also authorized to refuse to issue said permit, when, after an investigation of the facts and circumstances pertinent to said application, he believes it would be proper to refuse the issuance thereof, provided, however, that the said permit shall only be refused for the purpose of preventing riots, disturbances or disorderly assemblage.

The general nature of the right and title of municipalities in New Jersey to streets and public places, under the delegation of authority from the legislature contained in the statutes hereinabove referred to, or their predecessors, has been expressed as follows: In *Burlington* v. *Pennsylvania Railroad*, 56 N. J.

Eq. 259, the Court of Chancery of New Jersey said (p. 261):

> "A municipal government, invested with the ordinary power to regulate streets, is a trustee for the public."

The extent to which the decree below shackles petitioners in the performance of duties universally conceded to depend peculiarly upon the exercise of discretion by state and municipal officers, is made clear by a consideration of some of the adjudicated incidents of local police control of streets and parks. The first measure of the extent of such control over streets and highways is the consideration of safety, whether involved in the problem of traffic or in that of disorderly assemblage.

In *Long* v. *Jersey City*, 37 N. J. L. 348, at page 352, the New Jersey Supreme Court said:

> "The mayor and aldermen having, under their charter, ample power, it should be regarded as one of their chief duties, also, to secure to their citizens and others the free use of the public streets, by adopting and enforcing proper regulations to prevent or remove all unnecessary obstructions, and to restrict within the narrowest practicable limits such as may be sometimes necessary."

In *Harwood* v. *Trembley*, 97 N. J. L. 173, Chief Justice Gummere, speaking for the New Jersey Court of Errors and Appeals said, at page 175:

> "* * * The streets of a city are common highways, primarily designed for the use of the public in passing and repassing and in such temporary occupancy as is incidental to the exercise of those

rights. No one is justified in obstructing a public street by collecting therein a large assemblage of people for the purpose of delivering an address to them. The common highways of the state are not designed for the purpose of holding public meetings therein, and anyone who attempts to do this, without having first obtained permission from the public authorities in charge of such highways, commits a public nuisance. The constitutional guaranty of liberty of speech no more authorizes a citizen to appropriate to his own use the public property of a community for the purpose of exercising that guaranty than it permits him to occupy *in invitum* the private property of a fellow citizen for the same purpose."

In accord: *Dillon, Municipal Corporation,* 5th ed., Sec. 1163; *Mettler* v. *Ottumwas,* 197 Ia. 187; *Glasgow* v. *City of St. Louis,* 87 Mo. 678; *In re Unger,* 1 Okl., Cr. 222; *cf. Commonwealth* v. *McCafferty,* 145 Mass. 384; *Fifth Avenue Coach Co.* v. *City of New York,* 194 N. Y. 19; *Denny* v. *City of Muncie,* 197 Ind. 28; *City of Stevens Point* v. *Bocksenbaum,* 225 Wis. 373; *Sproles* v. *Binford,* 286 U. S. 374; *Chicago Park District* v. *Lattipee,* 364 Ill. 182; *Garneau* v. *Eggers,* 113 N. J. L. 245; *Wilbur* v. *City of Newton,* 16 N. E. (2d) 86 (Sup. Ct. Mass. 1938).

In *Thomas* v. *Casey,* 121 N. J. L. 185, the Jersey City street meeting ordinance presently in question was construed by the Supreme Court of New Jersey in reference to two applications for permits to speak in the streets made by Norman Thomas, both of which were denied by the municipal officers. To test the validity of the denial of the second application, Thomas brought mandamus proceedings, to compel the Director of Public Safety of Jersey City to grant

him a permit. The Court upheld the Director's refusal to grant him a permit and in the course of its opinion said, p. 190:

> "The present case in no sense involves the relator's right to speak as he pleases within the confines of the state and federal constitutions. However, he may not speak in public places in Jersey City without the permit of the properly constituted authorities, even though with such permit he would be justified in making the speech intended. The public have a right to the uninterrupted enjoyment of the highways and parks maintained at public expense."

It clearly appears from the foregoing, therefore, that the unquestionable status of the local law of New Jersey is to the effect that the control and regulation of streets and public places has been absolutely entrusted to the municipalities of the state by delegation of power from the Legislature; that within the due limitation of such delegation, the City of Jersey City has properly enacted its ordinance requiring, as a prerequisite for the use of streets and public places for meetings and assemblies, that the applicant obtain a permit for such purpose, issuable in the discretion of the Commissioner of Public Safety, where no riot, disorder or disorderly assemblage is likely to ensue from the holding of such meetings.

(b) *Davis* v. *Commonwealth*, 167 U. S. 43, Upholds the Constitutional Right of a Municipality to Regulate the Use of Public Places by Requiring Permits for the Holding of Meetings Thereon.

The leading case in our jurisprudence upon the question of the constitutional right of a municipality to regulate the use of its public places by requiring a

permit for the holding of a meeting therein is *Davis* v. *Commonwealth*, 167 U. S. 43. That case was originally before the Supreme Judicial Court of Massachusetts under the title of *Commonwealth* v. *Davis*, 162 Mass. 510. The Court had before it for review the conviction of one Davis for the violation of an ordinance of the City of Boston, which provided that:

> "No person shall, in or upon any of the public grounds, make any public address * * * except in accordance with a permit from the Mayor."

In passing upon the validity of the ordinance, Mr. Justice Holmes, then a member of the Massachusetts Court, and the liberality of whose views cannot be questioned, said:

> "* * * That such an ordinance is constitutional is implied by the former decision, and does not appear to us open to doubt. To say that it is unconstitutional means that, even if the legislature has purported to authorize it, the attempt was vain. The argument to that effect involves the same kind of fallacy that was dealt with in *McAuliffe* v. *New Bedford*, 155 Mass. 216. It assumes that the ordinance is directed against free speech generally (as in *Village of Des Plaines* v. *Boyer*, 123 Ill. 348, the ordinance held void was directed against public picnics and open-air dances generally), whereas in fact it is directed toward the modes in which Boston Common may be used. There is no evidence before us to show that the power of the legislature over the common is less than its power over any other park dedicated to the use of the public, or over public streets, the legal title to which is in a city or town. *Lincoln* v. *Boston*, 148 Mass. 578, 580. As a representative of the public, it may and does exercise control over

the use which the public may make of such places, and it may and does delegate more or less of such control to the city or town immediately concerned. *For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.* When no proprietary rights interfere, the legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses. So it may take the less step of limiting the public use to certain purposes. See Dill. Mun. Corp., §§393, 407, 651, 656, 666; *Commissioners* v. *Armstrong,* 45 N. Y. 234, 243, 244." (Italics supplied.)

On appeal to the Supreme Court of the United States (*Davis* v. *Commonwealth of Massachusetts, supra*) Mr. Justice White, after citing with approval the above-quoted language of Justice Holmes, said:

"It is therefore conclusively determined there was no right in the plaintiff in error to use the Common except in such mode and subject to such regulations as the legislature in its wisdom may have deemed proper to prescribe. The 14th amendment to the Constitution of the United States does not destroy the power of the states to enact police regulations as to the subjects within their control (*Barbier* v. *Connolly,* 133 U. S. 27, 31 (28:925); *Minneapolis & St. L. R. Co.* v. *Beckwith,* 129 U. S. 26, 29 (32:585, 586); *Giozza* v. *Tiernan,* 148 U. S. 657 (37:599); *Jones* v. *Brim,* 165 U. S. 180 (41:677), and does not have the effect of creating a particular and personal right in the citizen to use public property

in defiance of the Constitution and laws of the State.

"The assertion that although it be conceded that the power existed in the state or municipality to absolutely control the use of the Common, the particular ordinance in question is nevertheless void because arbitrary and unreasonable in that it vests in the Mayor the power to determine when he will grant a permit, in truth, whilst admitting on the one hand the power to control, on the other denies its existence. The right to absolutely exclude all right to use necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser * * *."

The respondents, as well as the majority of the Circuit Court of Appeals, attempt to distinguish the *Davis* case from the instant situation, in that Davis never applied for a permit as did respondents. This is a distinction without a legal difference, since it is fundamental that where an ordinance or statute is invalid on its face, and an attempt is made to enforce its penalties in violation of constitutional right, the person arrested may raise the constitutional question without having applied for the permit required by the ordinance or statute in question. *Smith* v. *Cohoon*, 283 U. S. 553, 562. The decision of the *Davis* case is therefore in point with the present situation, so far as the primary question of constitutionality is concerned. There is, furthermore, no indication whatever in the opinion of Mr. Justice White, speaking for the Supreme Court in that case, that the determinations stated in the opinion depended to any extent on the fact that Davis had not applied for a permit. Furthermore, the majority

opinion of the Circuit Court of Appeals in this case concedes that its ruling with respect to the constitutionality of the Jersey City ordinance is in conflict with that of this Court in the *Davis* case (R., Vol. IV, p. 116).

The result of the *Davis* case in upholding the validity of municipal control of streets and public places under the police power reserved to the states is particularly salutary at this date, as a matter of public policy, since the degree of supervision and regulation which may be reasonably vested in municipalities for the purposes of control, must necessarily increase rather than be abridged, in the light of the constantly increasing volume of traffic in urban communities.

In *Bradley* v. *Public Utilities Commission*, 289 U. S. 92, 95, Mr. Justice Brandeis, in discussing state legislation regulating the use of highways by motor carriers of freight, said:

> "Regulation to insure safety is an exercise of the police power. It is primarily a state function whether the locus be private property or the public highways."

In *Allen & Reed, Inc.* v. *Presbrey*, 50 R. I. 53, 56, 59, it was said, in reference to a municipal ordinance regulating the parking of automobiles on city streets:

> "By the general rules of law the public has an easement upon the land lying within the lines of the highway * * *. This right and easement of the public is primarily to a free passage on the public streets and sidewalks; the right to stop when the occasion demands is generally an incident of the right to travel * * *
>
> "* * * The fact is the use of the automobile

has increased so suddenly and enormously that the problem of traffic control has not yet been solved. The time may soon come when it will be necessary to prohibit any but a momentary stop in city streets. The decision of the necessity of such or other regulations in the first instance should be left to the local authorities who are familiar with the local situation. The courts are in no position to formulate traffic regulations for different communities."

What was said by the Rhode Island court is no less applicable to the desirability and necessity for local control of questions of traffic obstruction and public disorder, growing out of mass meetings on the public streets.

Since the rendition of the decision by this Court in the *Davis* case, it has had no occasion again to pass upon the question presented to it for adjudication in that case. The ruling of the Court is therefore the settled law of the land.

(c) *Near* v. *Minnesota* and Kindred Cases Are Not Applicable to the Issues Involved Here and Do Not Overrule or Modify *Davis* v. *Massachusetts, supra.* Moreover, *Lovell* v. *Griffin* is Clear Authority to the Effect That the Objective of Prevention of Disorder, at Which the Jersey City Ordinance is Directed, May Be Constitutionally Applied as a Test for Regulation of the Use of the Streets.

Respondents rely upon a group of cases decided by the United States Supreme Court, which held, in substance, that a state may not interfere with the privileges of free speech and free press, *as such,* by imposing conditions of previous restraint based upon the likelihood of public riot or disorder, or licensing requirements not based upon an acceptable standard of police power. *DeJonge* v. *Oregon,* 299 U. S. 353;

Lovell v. *City of Griffin*, 303 U. S. 444; *Near* v. *Minnesota*, 283 U. S. 697; and *Grosjean* v. *American Press Co.*, 297 U. S. 233. We accept the force and authority of these cases, but at the same time respectfully aver that they have nothing whatsoever to do with the constitutionality of regulation by public authorities of the use by private individuals and groups, of public streets and places for meetings and assemblies. The *Davis* case, cited *supra*, and the other cases which have followed its authority, demonstrate too clearly to require further extended exposition, that the incidental and qualified effect which a proper regulation by municipal authorities of their streets and public places may have upon the otherwise free and unbridled immunity that persons constitutionally enjoy from previous restraint upon their right to express themselves, is *damnum absque injuria*. Respondents have betrayed their recognition, albeit unwilling, of the soundness of this essential doctrine, by the unwarranted looseness and breadth of expression employed by them in attempting to stretch the cases above cited to cover this entirely foreign and unrelated situation. They have said, for example, that the *Lovell* case held that the freedom of the press means the freedom to distribute written matter on the public streets, municipal regulations as to the orderliness of such distribution notwithstanding. There is no such statement or holding, express or implied, in that case. The case merely held that within the doctrine of freedom of the press inhered the freedom to distribute written matter in whatever orderly manner might be necessary or expedient for such purpose. The Court said, describing the ordinance before it:

> "It is not limited to ways which might be regarded as inconsistent with the maintenance

of public order or as involving disorderly conduct, the molestation of the inhabitants or the misuse or littering of the streets."

The vice of the ordinance consisted in its unqualified interference with distribution, which is an essential component of freedom of the press. *Ex Parte Jackson*, 96 U. S. 727.

It appears from the facts of the case, furthermore, to the extent that they are recited in the opinion, that the distribution there in question was of a religious tract by the sect known as Jehovah's Witnesses. This type of distribution is commonly from house to house, only incidentally involving use of the streets. And even were the distribution shown to have taken place on the street, nothing appeared to indicate that such distribution would involve the degree of expropriation of the entire street area that ordinarily ensues when a mass meeting or assembly is held on a street, with its concomitant obstruction of traffic, littering of streets, and general disorder, if not riot. The clear implication from the quoted excerpt is that municipal regulations having a reasonable relationship in objective to any of the stated contingencies, would be constitutional. And the objectives of maintenance of public order and prevention of disorderly conduct are precisely those of the Jersey City ordinance in question, to wit, "to preserve public peace and good order, and to prevent riots, disturbances and disorderly assemblages".

Respondents also strenuously contend that the *Lovell* case establishes a new, so-called right of "free expression" on the public streets. The use of the word, "expression", convicts respondents of overreaching, not only the holding of the *Lovell* case, but also

its rationale. Petitioners do not believe that this Court was there concerned in the least with any so-called right of "free expression" on the public streets. There is not and never has been any general right of "free expression" recognized by any court. The use of such a catch-all, cover-all phrase is attended by the gravest risks of confused ideology, as is the use of any other lump-concept. The very distinction and differentiation made by Mr. Justice Holmes in his decision of the *Davis* case of the situation before him, from that involved in legislation truly abridging free speech or assembly, and also by the Supreme Court in affirming him, was based upon an implicit breakdown of the so-called right of free and uninhibited expression, under any or all circumstances, into the component situations involved, depending upon the particular time, place and circumstance of the particular attempted type of "expression". If that right is sought to be exercised in public streets and places in conflict with the right of the public at large to free and untrammeled use of such places, and in contravention of the discretion of the public officials entrusted with their administration, the right is necessarily dissipated; not because it is any the less intrinsically a fundamental right, but because, under the circumstances, its exercise becomes a perversion of the right and an invasion of the rights of the community generally. The "liberty" referred to in the Fourteenth Amendment, is, in the language of Mr. Justice Cardozo in *Palko* v. *Connecticut*, 302 U. S. 319, 325, "a concept of ordered liberty".

Nor is *DeJonge* v. *Oregon, supra*, in point. That case involved the constitutionality of a prosecution under the Criminal Syndicalism Law of Oregon for assisting in the conduct of a meeting of the Com-

munist party. The reference by the Court to the rights of free speech and peaceable assembly must obviously be understood in connection with their exercise, as in that case, in a private place.

In *Near* v. *Minnesota, supra,* this Court held that the previous restraint of the publication of a newspaper, based upon its proposed criticism of public officials that was malicious, slanderous and defamatory, constituted an infringement of the liberty of the press, protected against state invasion by the Fourteenth Amendment.

None of these cases, nor any of the others that are cited by respondents, bear in the remotest sense on the constitutionality of the requirement by municipalities of the issuance of a permit, in the discretion of an official charged with the maintenance of safety and order on the public streets, as a prerequisite for the right to address an assemblage or hold a meeting on such streets or other public places. *Cf. Gitlow* v. *New York,* 268 U. S. 652; *Fiske* v. *Kansas,* 274 U. S. 380.

The wide divergencies between the constitutional problems involved in the cited cases and that which was presented in the *Davis* case, and in the case *sub judice,* leave the Court the naked question as to whether the *Davis* case is now to be squarely overruled. Petitioners respectfully urge that the considerations of law and policy which controlled the Court forty years ago are no less present today, and that a ruling following that decision is plainly indicated in this case.

(d) The Doctrine of Unconstitutional Conditions is Not Properly Applicable to the Situation Involved Herein.

Respondents contend that if municipalities have the right absolutely to prohibit the use of public

places for assemblies and public meetings, they may not, nevertheless, make the grant of permission for such use contingent upon a subjection of the grantee thereof to an unconstitutional deprivation. *Frost* v. *Railroad Commission,* 271 U. S. 583. Petitioners agree. But that proposition is not here relevant.

In the *Frost* case, the Supreme Court was confronted with a California statute which imposed as a condition of the right of private carriers for hire to use the public highways, that they subject themselves to all the duties and burdens imposed by the statute upon common carriers, including the necessity of procuring a certificate of public convenience. The Court said that, conceding the right of the State to prohibit the use of the highways entirely, it could not constitutionally make its permission for their use dependent upon the conversion, against its will, of a private carrier into a public carrier, such conversion, by mere legislative fiat, having been held an unconstitutional imposition, under the Fourteenth Amendment, in *Michigan Commission* v. *Duke,* 266 U. S. 570. Careful analysis, however, indicates that the proposed analogy is not applicable to the instant situation. The unconstitutional condition imposed in the *Frost* case was, *in and of itself,* and without relation to any other factor, an unconstitutional deprivation of the rights of the corporation in question, *i. e.,* its forcible subjection to the status and burdens of a public carrier. In the present situation, the alleged unconstitutional condition, the requirement of the issuance of a permit for a street meeting, is not, in and of itself, an unconstitutional deprivation of rights. It has merely been held that the issuance of such a permit may not be made the prerequisite for the right to publish or distribute written matter, or,

perhaps, to hold meetings on private property, where the permit for such purposes is directed to be refused if riot and disorder are anticipated by the official to whom the application for the permit is directed. The so-called unconstitutional condition is not such in any absolute sense, but only in relation to the rights of free press and free speech, *as such,* when imposed as a basis for their previous restraint. Since the ordinance in the present case had to do, not with free speech or free press, as such, but *only with the control by the municipality of assemblages in the public streets,* the imposition of a condition based upon anticipated disorder or riot for that purpose was not an imposition of *the* unconstitutional condition condemned in the *Near* and kindred cases.

(e) The Weight of Authority is in Accord With the Decision of this Court in *Davis* v. *Commonwealth, supra,* to the Effect That the Proper Regulation and Restriction by Municipal Authorities of the Use of Streets and Public Places, Within the Police Power, is not in Conflict with the Constitutional Guarantees of Free Speech and Peaceable Assembly.

The holding of this Court in *Davis* v. *Commonwealth, supra,* has been repeatedly followed and applied by state courts of last resort throughout the country.

In *People ex rel. Doyle* v. *Atwell,* 232 N. Y. 96, the New York Court of Appeals passed upon the validity of a substantially similar ordinance. In upholding the validity of the ordinance, the Court of Appeals, through Judge McLaughlin, said (p. 100):

> "* * * The ordinance passed in pursuance of the power thus conferred is valid, since it is a reasonable exercise of the police power over the

public streets. It is not repugnant to the state or federal Constitution, since it does not abridge the right of free speech or assemblage * * *

"* * * *It is too well settled by judicial decisions in both the state and federal courts that a municipality may pass an ordinance making it unlawful to hold public meetings upon the public streets without a permit therefor to require discussion* * * *.

"The contention of the appellants that the ordinance prohibiting public speaking in the public streets abridges liberty of speech, and is, therefore, unconstitutional, is not sustained either by reason or authority. The answer to the contention is that the ordinance merely concerns the use of public streets and is not directed against or concerned with free speech generally. The people have many constitutional rights, the exercise of which on the public streets may be prohibited. *While there is a constitutional right of free speech, there is no constitutional privilege to exercise this right on the public streets in the form of there holding a public meeting.* The fallacy of the appellants' contention was pointed out by Mr. Justice Holmes in *Commonwealth* v. *Davis* (*supra*).

"* * * The right to grant or withhold a permit carried with it the exercise of discretion in the discharge of a public duty. The mayor, in passing upon an application, had to take into consideration the public safety as well as the public convenience. This involved, among other things, the place where the proposed meeting was to be held, the congestion in the street at that point, and the possible disturbance which the meeting might occasion." (Italics supplied.)

In a concurring opinion, the then Judge Cardozo agreed that the ordinance was constitutional. In a

dissenting opinion, Judge Pound also agreed that the ordinance was valid, and said:

> "The right to free speech and right of assembly are not absolute and under the ordinance the mayor had the power, and it was his duty, to withhold permits for street meetings when he thought that such meetings would interfere with travel or create disorder."

In *People* v. *Smith,* 263 N. Y. 255, the same court passed upon the validity of an ordinance of the City of New York which prohibited the preaching or expounding of atheism in parks, streets or other public places of the city, without a permit from the Police Commissioner. In sustaining the ordinance, Chief Judge Pound, writing for the unanimous court, said (p. 256):

> "Defendant, not having applied for a permit, has been convicted of expounding atheism in the street without such a permit. He now challenges the constitutionality of the ordinance as requiring permits for street speaking from exhorters of atheism and religion but not from speakers on other topics. He asserts that it deprives him of the equal protection of the laws and of freedom of speech.
>
> "'It is too well settled by judicial decisions in both the State and Federal courts that a municipality may pass an ordinance making it unlawful to hold public meetings upon the public streets without a permit therefor to require discussion. The right to pass such ordinance is a valid exercise of legislative power, properly delegated to the municipal authorities' (*People ex rel. Doyle* v. *Atwell,* 232 N. Y. 96, 100).
>
> "This ordinance is not aimed against free speech. It is directed towards the manner in

which the street may be used. *Commonwealth* v. *Davis,* 162 Mass. 510, affd. 167 U. S. 43. The legislative power might forbid public meetings and speaking in the streets entirely. It may limit the use of the streets to certain purposes."

The courts of Pennsylvania are in agreement with the foregoing principles. In *City of Duquesne* v. *Fincke,* 269 Pa. 112, the Supreme Court of Pennsylvania sustained a conviction for the violation of a city ordinance which forbade the holding of public meetings on the streets without obtaining a permit therefor. The Court held, on the authority of *Davis* v. *Massachusetts, supra; Wilson* v. *Eureka City,* 173 U. S. 32, and *State ex rel. Liberman* v. *Van De Carr,* 199 U. S. 552, that the passage and enforcement of the ordinance was not a violation of the Fourteenth Amendment to the Federal Constitution. It was further held that there was no violation of the provisions of the state constitution securing to the people the right of free speech and peaceable assembly, the Court saying, page 118:

"* * * His contention founded thereon, however, overlooks the fact that they do not give to him the right to assemble with others, and to speak wherever he and they choose to go. He would hardly admit that others would have the right so to do in his house, without his consent; and doubtless would concede the same to all other citizens. If he wishes to address an assemblage he must gather his audience together in places where he and they have the right to be for this purpose; and the streets are not such places, since they are intended for passage and not for assemblage. As was said in *Barker* v. *Commonwealth,* 19 Pa. 412, 413:

" 'The streets are common highways, designed

> for the use of public in passing and repassing, and in such temporary occupancy as are incidental to the exercise of these rights, or necessarily connected with them. No one has a right to obstruct a public street by collecting therein a large assemblage of men and boys, for the purpose of addressing them. * * * The common highways were designed for no such purpose. If the purposes of the meeting be lawful, a suitable place can be obtained for it, without obstructing the public in their undoubted right of passing along their own highway. The liberty of speech does not require that the clear legal rights of the whole community shall be violated.' "

See in accord *Barker* v. *Commonwealth,* 19 Pa. 412; *Commonwealth* v. *Egan,* 113 Pa. Super. 375.

Also in accord: *Fitts* v. *Atlanta,* 121 Ga. 567; *Bloomington* v. *Richardson,* 38 Ill. App. 60; *Love* v. *Phelan,* 128 Mich. 545.

In *Love* v. *Phelan, supra,* the rule was succinctly expressed in this manner, at page 549:

> "It is said the ordinance is directed against freedom of speech, but this is a mistake. It is simply directed to the method of using a public space, and is no more a curtailment of the right of free speech than would be an ordinance that prohibited the making of public addresses in the corridors of the city hall."

The cry of free speech is always raised at any municipal attempt to control and regulate the modern complex problems of street and traffic management affecting in an incidental manner, the congregation of persons in public places.

In *City of Tacoma* v. *Roe,* 190 Wash. 444, there was an appeal of a conviction under a municipal ordinance which made it unlawful for persons whose assemblage on a public street or sidewalk obstructed the free and uninterrupted use thereof by other persons, to refuse to move when requested by a police officer. The appellant contended that the ordinance was unconstitutional in that it attempted to abridge the freedom of speech and the right to assemble and petition for redress of grievances. The Court affirmed the judgment below, saying, 446:

> "We think it too obvious for argument that the ordinance has no such purpose or effect. Streets are designed for the traveling public, not as a meeting place or forum for the discussion of local or general public questions. Cities have power, subject to state legislation, to control the streets and regulate traffic upon them * * *."

The Court cited in accord: *State* v. *Sugarman,* 126 Minn. 477, 479, which held:

> "Streets and highways are dedicated, secured, and maintained primarily for public transit, and must be so preserved. All other uses thereof must be subordinated or yield to the right of free and unobstructed passage."

The Court in the *Sugarman* case, *supra,* said that the defendants "conceived the ordinance was directed against free speech and orderly assembly". The Court said (p. 483), in disposing of this contention:

> "But * * * the ordinance is not directed against anything of the kind except in so far as those engaged in thus propagating their views encroach on the right of free passage over public streets."

See also in accord: *Benson v. City of Norfolk*, 163 Va. 1037.

The Supreme Court of Illinois has likewise held, in accord with *Davis* v. *Commonwealth, supra,* that no person possesses the constitutional right to make a public address on social, political or economic subjects in places which the legislature of a state has committed to the control and regulation of local officials. *Coughlin* v. *Chicago Park District,* 364 Ill. 90.

A review of the foregoing authorities indicates that in an overwhelming majority of those American jurisdictions in which the question has been presented for adjudication, headed by the august authority of this Court in the *Davis* case, it is held that municipalities may constitutionally prohibit the use of streets and public places for public meetings and assemblies unless a permit therefor is obtained from the authorities entrusted with the duty and responsibility of supervising the use of such public places, and that ordinances providing therefor are not aimed against free speech at all, but are directed towards the manner in which the streets may be used.

It is submitted that sound reason, as well as the weight of authority supports this view.

(f) So Far as the Decree Below Relates to Public Meetings in Parks, it Cannot be Justified on Any Basis of Discrimination by Petitioners, Since There is no Proof Thereof in the Record, Nor by Any Consideration Based Upon the True Nature of Park Purposes.

Both the District and Circuit Courts found the Jersey City ordinance unconstitutional on its face, so far as meetings in public parks are concerned. The decree declared an absolute right to public meetings in parks, subject only to an easement of recreation in

the public. Both courts, moreover, found that petitioners had exercised discrimination in the enforcement of the ordinance, generally, without indicating that there was no evidence in the record that would support such a finding so far as the public parks were concerned. It is not shown that permits for public meetings in parks were granted *any* person or organization. The soundness of the determinations made by the courts below as to the unconstitutionality of the Jersey City ordinance with respect to its effect upon the claimed right to meetings in parks, must be judged, therefore, in the light, solely, of the true nature and functions of parks, and of applicable statutes governing their use.

At the outset, it is to be noted that Mr. Justice Holmes, in his opinion for the Massachusetts court in the *Davis* case, 162 Mass. 510, 511, considered the right of public control over the use of the parks to represent an *a fortiori* situation. He said:

> "There is no evidence before us to show that the power of the Legislature over the Common is less than its power over any other park dedicated to the use of the public, * * *"

A recent test of the claimed constitutional right to use a public park for the exposition of social and economic views before a large assemblage was the case of *Coughlin* v. *Chicago Park District, supra.* That case involved an application for a writ of mandamus to the Chicago Park District Commissioners to compel the issuance of a permit to Father Charles E. Coughlin to make an address on "Social Justice" at Soldiers Field in Burnham Park. The lower court granted the writ. The judgment was reversed on appeal. The appellate court indicated that the Chicago Park District had, in pursuance of legislative author-

ity, passed an ordinance relative to the control and management of parks, prohibiting the making of public addresses or meetings without a permit from the General Superintendent of the park, under terms authorized by the Park Commissioners. In reversing, the Court cited *Commonwealth* v. *Davis, supra,* and other cases in accord, saying:

> "We are convinced of the soundness of the view expressed in the above mentioned decisions to the effect that no citizen has a right to use, at his pleasure, or on his own terms, public property belonging to and under the control of a municipality, without a permit from a designated officer of such municipality or its executive officers * * * The appellees do not admit the authority for or validity of a regulation prohibiting the use of Soldiers Field for the use of an individual or organization for the purpose of making a public address on a social, political or economic subject. This whole set of contentions is based upon the claim that there is a constitutional and a primary or inalienable right in the appellees to use Soldiers Field for public addresses on those subjects, regardless of the municipality's right to control, manage, and regulate this park facility, with the parks generally, for the best interests of the public. No such right exists in any member of the public. The Legislature by the acts of 1869 and 1933 gave the power of regulation to the appellant commissioners."

Another apt expression of the same point of view is to be found in *Commonwealth* v. *Abrahams,* 156 Mass. 57, 60:

> "The parks of Boston are designed for the use of the public generally, and whether any

park or a part of any park can be temporarily set aside for the use of a portion of the public is for the park commissioners to decide, in the exercise of their discretion."

The matter in hand is thus seen to resolve itself into a question, not of constitutionality or ordinances restricting the right of assembly and free speech in parks, but of the propriety, *in any event,* of such use of places devoted to general park purposes, from either the aspect of the nature of park purposes, generally, or that of the local law of the State of New Jersey on the subject. With respect to the former, petitioners are content to cite the language of Judge Pound, speaking for the New York Court of Appeals, in *Williams* v. *Gallatin,* 229 N. Y. 248. In that case, plaintiff, a taxpayer of New York City, sought to enjoin the Park Commissioner of the City from executing a lease of a building in Central Park to the defendant, Safety Institute of America, on the ground that the proposed lease would involve a diversion of the building from normal park purposes. The proposed lessee was a non-pecuniary organization, aided by state subsidy, whose objects were to study and promote means and methods of safety and sanitation. Its intention was to use the park building for the preservation and exhibition of safety devices and methods. In holding that the proposed lease did not constitute a use of the building for park purposes, the Court said, in an opinion in which Judge Cardozo, then a member of the Court, concurred, pages 253, 254:

"A park is a pleasure ground set apart for recreation of the public, to promote its health and enjoyment. *Perrin* v. *N. Y. Central R. R. Co.,* 36 N. Y. 120, 124. It need not, and should

not, be a mere field or open space, but no objects, however worthy, such as courthouses or school houses, which have no connection with park purposes, should be permitted to encroach upon it without legislative authority plainly conferred, even when the dedication to park purposes is made by the public itself and the strict construction of a private grant is not insisted upon * * * Differences naturally arise as to the meaning of the phrase 'park purposes'. Under local statutes it has been held that a public library may be erected in a park without diverting it from such purposes, * * * and the city of Hartford was permitted to turn over a part of the land it had dedicated as a public park to the state for the purpose of a state capitol * * * Monuments and buildings of architectural pretension which attract the eye and divert the mind of the visitor, floral and horticultural displays, zoological gardens, playing grounds, and even restaurants and rest houses, and many other common incidents of a pleasure ground, contribute to the use and enjoyment of the park. The end of all such embellishments and conveniences is substantially the same public good. They facilitate free public means of pleasure, recreation and amusement, and thus provide for the welfare of the community. *The environment must be suitable and sightly or the pleasure is abated* * * * The legislative will is that Central Park should be kept open as a public park ought to be, and not to be turned over by the commissioner of parks to other uses. *It must be kept free from intrusion of every kind which would interfere in any degree with its complete use for this end.*

"To promote the safety of mankind and to advance the knowledge of the people in methods

of lessening the number of casualties and avoiding the causes of physical suffering and premature death is the purpose of the Safety Institute of America; to provide means of innocent recreation and refreshment for the weary mind and body is the purpose of the system of public parks. *The relation of the two purposes is at best remote.* No reproach is cast upon the humanitarian aims of the Safety Institute when we say that it must find another place in which to bring them to the attention of the public." (Italics supplied.)

To borrow the language of Judge Pound, the relation between the recreation and refreshment of the weary mind and body, on the one hand, and the hue and cry and excitement, to say the least, of mass meetings devoted to violently controversial harangues on social and economic subjects, attended by crowds of people and large numbers of police, is remote in the extreme. Subservience to the latter objective implies a surrender of the duty and obligations of the municipality with respect to the former. The respective objectives are antithetical.

See also *Williams* v. *Hylan*, 223 App. Div. 48, affd. 248 N. Y. 616; *In Re Central Parkway, City of Schenectady*, 140 Misc. Rep. 727; *Dieppe Corp.* v. *City of New York*, 246 App. Div. 279.

The New Jersey statute dealing with municipal creation and control of parks[6] was referred to in subpoint (a) hereinabove. It was furthermore there seen that under the New Jersey law as expressed in the case of *West* v. *Monmouth Beach, supra*, a diversion of park

[6] See Appendix C.

property by a municipality for any purpose not expressly sanctioned by the statute, was held illegal.

In view of the foregoing, it is respectfully submitted, that whatever may be decided as to the constitutionality of the Jersey City ordinance as applied to meetings on public streets, that part of the decree dealing with public parks should unquestionably be eliminated therefrom, since the ordinance in relation to parks is not only valid on its face, but has not been arbitrarily applied by petitioners.

(g) The Decree Below is Further Objectionable in Disregarding the Rights of the Residential Public of Jersey City to Peace and Quiet.

The Courts below were apparently actuated by the thought that, if no appreciable traffic problem was involved in an application to hold a public assemblage on a particular street, as, for example, in a quiet or secluded residential area, there was no other consideration that could lawfully move the authorities in their deliberations as to whether the permit should be granted. The terms of the decree appealed from, therefore, qualify the otherwise absolute right of the respondents to hold meetings on the streets of Jersey City, to the extent of a reasonable easement of traffic only. This attitude completely overrides the important right of persons residing in less heavily traveled areas of the city, to be free from the annoyance and disturbance of mass meetings on the streets, in front of, or within earshot of their homes. This consideration gains point when it is considered what tumult, if not outright disorder, might be reasonably expected to attend the staging of mass meetings similar to those planned by respondents in December, 1937 and in April and May, 1938, as evidenced by the record herein. Is a residential street,

any more than a business thoroughfare, functionally accommodated to such a purpose? Is it a stifling of free speech and assembly for the municipal officials in charge, in passing upon an application for a meeting on a street, to give thought to the rights of persons residing nearby? Under the decree appealed from, as framed, they may not.

In *Billington* v. *Miller,* 75 N. J. L. 415, the New Jersey Supreme Court, long before the petitioners herein had any voice in the government of the affairs of Jersey City, had before it for consideration an attack upon the validity of an ordinance of that city prohibiting roller skating on a residential portion of Bergen Avenue. In sustaining the validity of the ordinance, the Court said, 416:

> "The evidence shows that the portion of Bergen Avenue on which roller skating was prohibited was so given up to the sport as to constitute a serious injury to abutting property owners, if it did not indeed unreasonably obstruct the public traffic on the street. These abutting property owners were entitled to protection as a part of the public most immediately concerned, and it was quite as much to the common interest of all citizens to secure that protection as to secure an unimpeded passage for vehicles."

(h) The Director of Public Safety Did Not Abuse the Discretion Vested in Him by the Ordinance in Question When He Denied Respondents' Applications for Permits for Street Meetings.

The District Court did not make a finding of fact that the petitioner Casey, as Director of Public Safety, abused the discretion vested in him by the ordinance, when he denied the respondents' applica-

tion for permits for street meetings. Indeed, it cannot be seen how any Court could decide that there was an abuse of discretion under the circumstances which caused the Director of Public Safety to take the action which he did. The evidence clearly indicates that every application which was denied, was denied because, in the opinion of the Director of Public Safety, the proposed meeting would result in riot, disturbance or disorderly assemblage. Never was a permit denied, *ipso facto,* because the applicant was a member of a particular group or party. In every instance, regard was had to the temper of the citizens and the effect which the presence of a proposed speaker would have upon the peace of the community under the existing circumstances. That is not discrimination; it is discretion. That is the very purpose for which the ordinance was passed. The very object which it seeks to accomplish is to preserve the public peace and good order by placing upon the shoulders of the Director of Public Safety the responsibility of determining whether or not a meeting would result in disorder. He must exercise the discretion imposed upon him, and his determination should not and cannot be upset in the absence of a clear and convincing showing that there has been an abuse of such discretion. No rule of law is better established: *Gaines* v. *Thompson,* 74 U. S. 347; *Ness* v. *Fisher,* 223 U. S. 683; *Louisiana* v. *McAdoo,* 234 U. S. 627, 633; *Work* v. *Rives,* 267 U. S. 175, 183; *Procter & Gamble Co.* v. *Coe,* 96 Fed. (2d) 518, 520; *Garneau* v. *Eggers,* 113 N. J. L. 245. It is a rule grounded in common sense. Manifestly, a court should not undertake to place itself in the position occupied by the Director of Public Safety and undertake to perform the functions imposed upon that official by

the law. The statute in question calls for his judgment—not the Court's judgment, and unless the Court finds by convincing proof that there has been a clear violation of duty on the part of the municipal officer by abusing the discretion which the law imposes upon him, it is not justified in disturbing his determination.

In *Sullivan* v. *Shaw*, 6 Fed. Supp. 112 (D. C. Cal.), the United Front Conference Against Hunger, an organization designed to protest the hunger and starvation of workers, applied to the City Council of Los Angeles for a permit to hold a protest parade. The City Council denied the permit, under a municipal ordinance designating a certain portion of the City, including the streets in which the plaintiffs desired to parade, over which parades were not permitted without a permit from the Council. The plaintiffs alleged in their bill that similar applications by them had been theretofore denied by the Council, whereas applications for similar parades by other bodies had been granted, and it was further set forth that the action of the Council was motivated by the political and economic views of the plaintiff, and constituted unlawful discrimination, under the Fourteenth Amendment to the Federal Constitution. In denying the application for the injunction, the District Court said:

> "The power to grant or refuse permits must, however, be exercised without discrimination. A permit to parade may not be granted to one and refused to another under similar circumstances. Time, circumstance, and occasion, however, properly enter into the decision of the city council. That body might well consider seriously the granting of a permit for a parade of 60,000 peo-

ple, or any considerable fraction of that number, including an indefinite number of children withdrawn from public schools, through the main business streets of the city, necessarily loosely organized, not responsive to or amenable to the discipline that should attend such a demonstration and with possible incitation to riot and disorder.

"* * * *The city council may, however, examine all the circumstances attending such applications, and if there appears a reasonable basis for its action, such action is conclusive. It does not matter that the Court might differ from its conclusions.* Under the circumstances here presented, the city council exercised a reasonable discretion in the refusal of the permit." (Italics supplied.)

The application of the foregoing rule is especially appropriate in New Jersey where liability for property damage and personal injury sustained through riot is imposed on the municipality by statute. (See New Jersey Revised Statutes of 1937, Secs. 2:63-1; 2:63-10.)[7]

It is true that the petitioner Casey based his denial of the permits upon information gleaned by him from the public press, and other available sources of information, to the effect that the proposed speakers were communists and radicals, and exponents of a political philosophy which would be violently resented by a large number of the citizens of Jersey City. Many exhibits of newspaper clippings, magazine articles, reports of committees and the like, were admitted in evidence for the purpose of showing a basis for the so-called state of mind which led to the refusal

[7] See Appendix D.

by the petitioner of the applications in question. The Director of Public Safety was justified in relying upon such information. It furnished a reasonable basis for the "state of mind", which led him to make his decisions. And if there was a conceivably reasonable basis for his action, it cannot be said that there was an abuse of discretion, *regardless of what the reaction of the court below, or of this Court, or of any person other than the Director, would have been in similar circumstances.* Reliance upon information of the character described was reasonable because under the circumstances which obtained no better information could be secured. Under the ordinance an application may be submitted not less than three days before the proposed meeting. Manifestly, it would be impossible for the Director to ascertain by legally competent evidence, within a three day period, whether or not a proposed speaker's prior activities had been such as would arouse resentment on the part of the citizens. To require him to do so, would be tantamount to compelling him to conduct a judicial inquiry every time an application for a permit was received. Even if it were feasible for him to do so, and even if as a result of such inquiry he determined to his own satisfaction that the information carried in the public press was untrue, nevertheless the most important element entering into his decision would not be affected, namely, what the public at large, which secures its information from the newspapers and similar sources, thought that the proposed speaker stood for. That is what the Director of Public Safety would have to deal with, because he is charged with the duty of avoiding riots and disturbances, and it would be upon the basis of information brought to the public by the press that the public would be reasonably expected to react.

It is contended, therefore, that for all of these reasons the petitioner Casey was justified in acting upon the information gleaned from the sources which were available to the public at large, and in proceeding upon the theory that where there was smoke there must be fire. The nature and extent of the information upon which the refusal to grant these permits was based, has heretofore been reviewed in detail, and we submit that it formed a substantial basis for the Director's exercise of discretion, and that consequently there was no abuse of discretion.

POINT II.

The injunction entered below is defective because vague, uncertain and impracticable of enforcement by the Court or of compliance by petitioners.

(a) The Injunction is Impracticable of Enforcement by the Court.

The injunction entered by the Court below is such that it will not be feasible for it to enforce the provisions of the decree. It should, therefore, not have been entered. An enforcement of its provisions will require the District Court to exercise supervisory power over the administration of government in Jersey City and to interfere with the orderly exercise of governmental duties. The injunction entered in the decree below, with respect to certain of the matters complained of, is such that the District Court has constituted itself an ordinance making body and has directly involved itself in the detailed administration of the public business of the city.

Having declared the street meeting ordinance unconstitutional on its face, both with respect to meet-

ings on the streets and in the public parks, the orderly step for the Circuit Court to have taken in reviewing the injunction as entered by the District Court would have been to enjoin the enforcement of the ordinance by petitioners, in terms. In lieu thereof, however, the Circuit Court affirmed the provisions of the decree, as entered, which enacted that as to meetings in parks, persons intending to hold such meetings should make application for a permit three days in advance of the meeting. To whom the application should be made is not expressly provided. The permit may be denied the applicant if the time or place designated in the application is in reasonable conflict with the public recreational purposes of the parks. Nowhere, however, is there any specification in the decree or in the opinion of the Court as to what such recreational purposes of the parks may be. With respect to meetings on the public streets, a similar application for a permit is required to be made, and the decree compels the issuance thereof, subject only to a reasonable interpretation by petitioners of the easement of public passage on the streets. Again, no *criteria* are furnished either in the decree or in the opinion as to what may constitute a reasonable interpretation of the said right of public passage.

It is further ordained by the Court in its new status as the governing body, *pro tanto*, of Jersey City, that when such meetings are held, adequate police protection shall be afforded and that petitioners are to see to it that the speakers are free from interruption by such persons as may be present at such meetings. It is provided, however, that such protection shall not be required when inconsistent with the maintenance of public order by petitoners in the remainder of the city.

The remaining portions of the decree are equally vague and therefore impracticable of enforcement by the Court. Such general provisions are made in the decree, for example, as that the petitioners should not act in an unlawful manner toward the respondents with respect to such matters as their liberty to go about the city freely, to communicate with each other and with other persons on the streets, to be free from unlawful arrest, and to circulate and distribute pamphlets and leaflets, provided that the distribution of said leaflets is carried out in an orderly manner. The effect of these provisions of the decree is simply to enjoin illegal conduct, to order the petitioners to do what is right. Enforcement of such a general direction is the proper function of the police authorities of the municipality. The number of subjective *criteria* embodied in the entire decree is such as not only to make any attempt at enforcement impracticable in the extreme, but likely to result in a perversion of the proper and peculiar functions of a court. A decree which cannot be feasibly enforced within the due limits of the true functions of a court should not be rendered in the first instance. *Texas, etc. R. R. Co.* v. *Marshall*, 136 U. S. 393; *Poultry Producers* v. *Barlow*, 189 Cal. 278.

(b) The Decree is Impracticable of Compliance by Petitioners.

The accuracy of the characterizations of the decree made hereinabove is apparent upon close examination of the provisions thereof. Paragraph B4(a) enjoins petitioners from restraining respondents in the holding of meetings and assemblies in the parks and open air—

> "* * * provided * * * that such permit may be refused these plaintiffs or any of them only

for the reason that the particular time or place designated in the application is in reasonable conflict with the public recreational purposes of said parks."

Paragraph B4(b) requires petitioners to afford police protection at such park meetings—

"* * * provided only that such protection is reasonably consistent with the ability of the defendants to carry out their obligations in regard to the safety of the residents of Jersey City."

Paragraph B4(d) enjoins petitioners from refusing respondents the right to hold public meetings on any of the public streets, highways or thoroughfares of Jersey City—

"* * * provided that the rights of the plaintiffs or any of them to hold meetings on the public streets, highways, thoroughfares or places of the City of Jersey City be held subject to a reasonable interpretation by the defendant of the acknowledged easement of public passage over any of said public streets, highways, thoroughfares or places of the City of Jersey City."

Obviously, as many interpretations of these provisos are possible, as is the number of particular public officials who might be called upon to construe them in relation to a particular application. It is not at all unreasonable to suppose that respondents might have one interpretation, the petitioner Casey another, and the Court hearing a contempt application, a third. Each of the provisos set forth above is in flagrant disregard of the rule that an injunction, being subject to penal enforcement in the event of violation,

should be clear and certain in its terms, and free of the necessity, on the part of those to whom it is directed, of drawing inferences from or making interpretations of its context.

In *National Labor Relations Board* v. *Bell Gas & Oil Co.*, 98 F. (2d) 405, 406 (C. C. A. 5, 1938), it is said:

> "Mandatory injunctions should be clear, direct, and unequivocal. They should not be hedged about by conditions and qualifications which cannot be performed, or which may be confusing to one of ordinary intelligence."

In *Evening Times Printing & Publishing Co.* v. *American Newspaper Guild*, 124 N. J. Eq. 71, 75, there was an appeal from an injunction which restrained the defendants "from making any illegal effort to coerce the complainant to enter into any contract or agreement with all or any of the defendants". In striking the injunction the Court of Errors and Appeals of New Jersey said:

> "* * * It is illegality that is restrained. How are the defendants to know with certainty whether a proposed act is or is not illegal? Disobedience of an injunctive order may be followed by a finding of guilt in criminal contempt and by punishment accordingly. A writ of injunction should be the criterion for the person who is enjoined. It should be plain and certain on the face of it. *Richards* v. *West*, 3 N. J. Eq. 456. To restrain the threatening or doing of things 'unlawful' and not to point out what specific acts are under restraint is to leave the order vague and uncertain. * * *"

In *Collins* v. *Wayne Iron Works*, 227 Pa. 326, on a bill for injunction by a property owner for the abate-

ment of noise made by a nearby iron works factory, a writ was entered by the trial court restraining the operation by the defendant of its works "by making noises * * * so as to render the premises of the plaintiff described in the said bill unfit for use and enjoyment as a residence by a *reasonable and normal person.*" (Italics supplied.) The Court on appeal modified the injunction, using this language, pages 330, 331:

> "The entry of an injunction is, in some respects, analogous to the publication of a penal statute. It is a notice that certain things must be done or not done, under a penalty to be fixed by the court. *Sullivan* v. *Jones & Laughlin Steel Co.*, 222 Pa. 72. Such a decree should be as definite, clear and precise in its terms as possible, so that there may be no reason or excuse for misunderstanding or disobeying it; and, when practicable, it should plainly indicate to the defendant all of the acts which he is restrained from doing, without calling upon him for inferences or conclusions about which persons may well differ. * * * as the defendant's conclusion as to what constitutes 'a reasonable and normal person' may well differ from that of the plaintiff, it would seem that the only safe way to comply with the decree would be to entirely stop the running of its machinery. * * *"

There are numerous adjudications in accord: *City of Louisville* v. *Lougher*, 209 Ky. 299; *Robert E. Hicks Corp.* v. *National Salesmen's Training Association*, 19 Fed. (2d) 963, 965 (C. C. A. 7th 1927); *Ex Parte Heffron*, 179 Mo. App. 639; *Magel* v. *Gruetli Benevolent Society*, 203 Mo. App. 335; *Fort Worth Acid Works* v. *City of Fort Worth*, 248 S. W. 822 (Tex. Civ. App. 1922); *Ballantine* v. *Webb*, 84 Mich. 38; *Earl* v.

Brewer, 248 App. Div. 314; *Lone Star Salt Co.* v. *Blount,* 49 Tex. Civ. App. 138.

In *L. H. Henry & Sons* v. *Rhinesmith,* 219 Ia. 1088, 1093, the rule is stated:

> "Where one may subject himself to the perils of contempt of court for violation of an injunction, he is entitled to know specifically what the things are that he is restrained from doing. * * *"

The decree herein is in marked violation of the settled principles set out in the foregoing cases.

(c) The Vagueness of the Decree Has the Effect of Preventing Petitioners, at Their Peril of Criminal Liability, From Drafting a New Ordinance.

The terms of the decree as entered by the court, in the respects above noted, do not apprise petitioners of the things that they are restrained from doing. Unless the decree is corrected, petitioners are under the alternative of either completely abdicating the exercise of their duties and responsibilities with respect to the maintenance of safety and order on the streets and public places of Jersey City, or of running the peril of criminal liability consequent upon an interpretation by them of the decree, that may differ from that of a court hearing a contempt application. If, contrary to what has been urged hereinabove in Point I, the Jersey City ordinance or the manner of its enforcement by petitioners, is found to be unconstitutional, then petitioners are, at the very least, entitled to an authoritative definition and a certain direction from the Court as to their obligations with respect to the constitutional rights adjudicated. In the event of such direction petitioners will be enabled to take the

orderly step of drafting a new ordinance in keeping with the instructions of the Court. In the present posture of the decree, on the other hand, there can be envisioned only a future of confusion and uncertainty on the part of all the parties to this proceeding.

POINT III.

The District Court was not invested with jurisdiction of the subject matter of the bill of complaint.

Petitioners propose to indicate under this Point that the record of the proceedings below does not show any grounds upon which the District Court was justified in assuming or retaining jurisdiction of the subject matter of the bill of complaint. If this point is established to the satisfaction of the Court, then the decree appealed from must be reversed, without any reference to the meritorious questions considered in the antecedent points of this brief.

(a) The question of jurisdiction was in issue, having been raised by motion to dismiss the bill and by appropriate denials of the jurisdictional allegations in the answer, and it was incumbent upon the trial court to insist upon proof of the jurisdictional facts before assuming jurisdiction over the cause generally.

It is thoroughly established that the Federal District Courts are courts of limited jurisdiction, depending upon the express provisions of the Federal Statutes. *Klein* v. *Construction Co.*, 260 U. S. 226; *Mansfield, C. & L. M. R. R. Co.* v. *Swan,* 111 U. S. 379. No presumption will be entertained as to the existence of jurisdictional facts. Such facts must be alleged, and if controverted, must be proved. *Yeandle* v. *Pennsylvania R. R. Co.*, 169 F. 938 (C.

C. A. 3rd, 1909); *Klenk* v. *Byrne,* 143 F. 1008 (C. C. Wash. 1906).

The purported basis of jurisdiction in the present case is laid, in the alternative, under Judicial Code, Sec. 24 (1), Act of Cong. Mar. 3, 1911, C. 231, Sec. 24, 36 Stat. 1091, or under Judicial Code, Sec. 24 (14), Act of Cong. cit. *supra,* 36 Stat. 1092.

Section 24 (1) provides for original jurisdiction in the Federal District Court in all suits of a civil nature at common law or in equity where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, if the suit arises under the Constitution or laws of the United States.

Section 24 (14) provides for one of a number of situations within which original jurisdiction may be assumed by the Court without regard to the three thousand dollar jurisdictional requirement of Section 24 (1). Section 24 (14) is applicable to all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any State law, statute, ordinance, etc., of any right, privilege or immunity secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens, or of all persons within the jurisdiction of the United States.

Paragraph 6 of the Bill of Complaint contains the jurisdictional allegations applicable to Section 24 (1) aforementioned, and Paragraph 7 of the Bill makes the *pro forma* recitals designed to meet the requirements of Section 24 (14). Both of these allegations were brought into issue below by the petitioners, first, by direct traverse in the answer of the stated paragraphs of the bill, and, secondly, in the form of a motion to dismiss the bill for lack of jurisdiction, which was denied by the trial court,

The jurisdiction of the court below having been brought into issue by petitioners, it was incumbent upon the trial court to require proof of the jurisdictional facts, and its failure to do so constitutes error. The federal district courts must assure themselves of federal jurisdiction in every case before them. *Miller* v. *First Service Corp.*, 84 F. (2d) 680 (C. C. A., N. D., 1936).

In *McNutt* v. *General Motors Corp.*, 298 U. S. 178, the Court said, in reference to the Act of 1875 (28 U. S. C., Section 80), empowering and authorizing District Court Judges to dismiss an action where it appears that the jurisdictional facts are missing:

> "The authority which the statute vests in the Court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. * * * The Court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence."

In *Kvos* v. *Associated Press*, 299 U. S. 269, an action was brought by the Associated Press to enjoin a radio station from appropriating and broadcasting news gathered by the plaintiff or its members during the period that such news retained commercial value to the plaintiff. The bill of complaint contained the usual recital to the effect that the amount concerned in the action involved the sum of $3000, exclusive of interest and costs. The defendant filed a motion to

dismiss, assigning, among other grounds, that the Court was without jurisdiction because the matter in controversy did not exceed $3000. Affidavits were presented by both sides on the return of the motion and the Court found that "the amount in controversy * * * must be construed to be in excess of $3000. exclusive of interest and costs". The bill was dismissed, however, on the merits, the Court finding no grounds for an injunction. On appeal, the Circuit Court reversed, finding in favor of the plaintiff on the meritorious questions involved, and also concluding that "the several millions of dollars alleged to be invested in the association's business may well be damaged to the extent of $3000. by the pirating practices described". The Supreme Court reversed on the ground that, under the circumstances, the plaintiff-respondent had the burden of showing that the case was within the District Court's jurisdiction and had failed to carry it. The Court (p. 277):

> "The bill seeks redress for damage to the respondent's business and for damage to the business of some or all of its members. The right for which the suit seeks protection is, therefore, the right to conduct those enterprises free of the alleged unlawful interference by the petitioner. *No facts are pleaded which tend to show the value of that right.* The complaint contains nothing to the purpose save the general statement that the damage to which the respondent is being subjected is in excess of three thousand dollars and the amount involved is in excess of that sum. Such a formal allegation is sufficient, unless the bill contains others which qualify or detract from it in such measure that when all are considered together it cannot fairly be said that jurisdiction appears on the face of the complaint, in which

case the suit should be dismissed by the court *sua sponte* or upon the defendant's motion. In this case the formal allegation is not reenforced or strengthened by other portions of the complaint; neither is it neutralized or weakened by qualifying or detracting allegations. In effect it stands alone. Therefore the court would not have been bound to dismiss upon a motion based solely on alleged insufficient pleading of the amount in controversy; though it might, of its own motion, have entered upon an inquiry to ascertain whether the cause was one over which it had jurisdiction. *But where the allegations as to the amount in controversy are challenged by the defendant in an appropriate manner, the plaintiff must support them by competent proof.*" (Italics supplied.)

The Court then considered the appropriateness of the method employed by the defendant to raise the question of jurisdiction and decided that it was proper. In this connection, the Court said that the raising of the question of jurisdiction (p. 278),

> "* * * could have been done by answer but the time for answer had not arrived when the rule to show cause was issued * * *."

The Court went on to say:

> "* * * The motion required the trial court to inquire as to its jurisdiction before considering the merits of the prayer for preliminary injunction. And in such inquiry complainant had the burden of proof. * * * Assuming, without deciding, that in the circumstances disclosed the respondent has standing to maintain a suit to redress or prevent damage caused its members by petitioner's conduct, the allegation of possible damage to them is wholly inadequate, because

> the asserted danger of loss of members is a mere conclusion unsupported by even a suggestion that withdrawal has been threatened by any newspaper, and no intimation is given of the character or extent of the damage they would suffer by such withdrawal. The respondent having failed to support the allegations as to amount in controversy the District Court should have dismissed the bill."

In *Oregon R. & Nav. Co. v. Shell, et al.*, 125 F. 979, 981 (C. C. Wash. 1903), in dismissing a bill in equity for failure to establish the requisite jurisdictional amount, the Court said:

> "The pleadings make an issue, and the burden of proof is upon the complainant, and, as the case was tried only upon the complainant's theory, no evidence was offered with respect to the value of the right of way nor of the amount of damages caused by the railroad, the Court is unable to make the findings necessary to sustain its jurisdiction. Therefore the case must be dismissed."

Under the cited authorities, accordingly, even if the asserted grievances of the respondents were of a pecuniary nature, having a consequence or value calculable in money, and immediately dependent on the litigation, no proof of the value of the matters in controversy was at any time offered by the respondents or required by the Court. There, therefore, never existed any tenable basis for jurisdiction under Judicial Code Section 24 (1), and, petitioners having raised the question in appropriate manner, the bill should have been dismissed.

(b) The matters in controversy were not shown to have a value in excess of $3,000.; the rights claimed did not have a "pecuniary" value or consequence, *i. e.*, "calculable" in money and "immediately", not remotely or contingently, dependent on the litigation.

Even had the trial court required, and respondents attempted to offer, proof of the pecuniary value of the subject matter of the bill, they would not have been able to establish such value, under the cases, because of the nature of the subject matter directly involved in the litigation.

The rights claimed, considered, as they must be, entirely apart from any remote and consequential gains, losses, liabilities or profits that might ultimately hang upon their present enjoyment, are the alleged rights to hold street meetings in the public places of Jersey City, to freely go about the business of organizing potential associates in the activities of the respondents, to be free from physical molestation unaccompanied by the due processes of arrest and arraignment, to be free from exclusion from the city, and kindred rights of a similar nature, all essentially without any direct, immediate, pecuniary consequence.

In *Smith* v. *Adams,* 130 U. S. 167, 175, Justice Fields construed the words, "the matter in controversy" as requiring a showing of,

> "the pecuniary result to one of the parties immediately from the judgment."

In *Wheless* v. *St. Louis,* 180 U. S. 379, 382, the language used is:

> "The 'matter in dispute' within the meaning of the statute is not the principle involved, but the pecuniary consequence to the individual party dependent on the litigation * * *."

No matter how precious or fundamental in importance the right involved, it is not amenable to the test of jurisdictional amount if the value of the right is not calculable in money.

In *Kurtz* v. *Moffitt*, 115 U. S. 487, for example, it was held that the personal freedom of an individual who was allegedly unlawfully imprisoned, did not constitute a subject matter capable of being valued in money and that, therefore, a writ of habeas corpus was not removable from a state court into the federal court, within the language of the removal statute, limiting the federal jurisdiction in such cases to,

> "Suits of a civil nature at law or in equity where the matter in dispute exceeds, exclusive of costs, the sum or value of $500.00."

The Court said (p. 498):

> "From this review of the statutes and decisions, the conclusion is inevitable that a jurisdiction, conferred by Congress upon any Court of the United States, of suits at law or in equity in which the matter in dispute exceeds the sum or value of a certain number of dollars, includes no case in which the right of neither party is capable of being valued in money; * * *"

The Court relied upon the language used by Chief Justice Taney in *Barry* v. *Mercein*, 5 How. 103, 120, to the effect that:

> "The words of the Act of Congress are plain and unambiguous. They give the right of revision in those cases only where the rights of property are concerned, and where the matter in dispute has a known and certain value, which

can be proved and calculated, in the ordinary mode of a business transaction. There are no words in the law which by any just interpretation can be held to extend the * * * jurisdiction beyond those limits and authorize us to take cognizance of cases to which no test of money value can be applied."

In *Oregon R. & Nav. Co.* v. *Shell, et al., supra,* the Court said (p. 981):

"* * * the case falls within the rule that, where jurisdiction depends upon a specified amount, jurisdiction does not attach to any case in which the right involved cannot be calculated in money."

In *Greenough* v. *Independence Lead Mines Co.,* 43 F. (2d) 659, 660, (D. C. 1930), the Court found that:

"The controversy has no value which can be calculated and ascertained in money to meet the jurisdictional amount * * *."

Not only must the subject matter of the suit be calculable in money, but the financial consequence dependent upon the litigation must be *directly, not remotely or contingently,* dependent thereon. It is furthermore immaterial what the collateral consequences of the decree or judgment may ultimately turn out to be, even though directly caused by, or dependent upon such decree.

In *Healy* v. *Ratta,* 292 U. S. 263, the question involved was whether the jurisdictional requirement was satisfied by a proceeding brought to enjoin a municipal chief of police from enforcing a statute which imposed an allegedly unconstitutional license fee requirement upon itinerant hawkers or peddlers. The

trial court was satisfied with the jurisdictional showing; but upon appeal the decree was reversed, the Court holding, page 267:

> "Appellee neither asks, nor could he properly be awarded a decree in the present suit restraining enforcement of the law by police officers elsewhere, and the collateral effect of the decree, by virtue of *stare decisis*, upon other and distinct controversies may not be considered in ascertaining whether the jurisdictional amount is involved, even though their decision turns on the same question of law."

In *Youngstown Bank* v. *Hughes*, 106 U. S. 523, it was considered that the jurisdictional amount was not involved in the claimed or alleged right of a bank not to be subjected to the damaging publicity consequent upon its being subpoenaed to reveal the amount of its deposits. The Court said that any damages to the bank would be "remote and speculative."

In *New England Mortgage Security Co.* v. *Gay*, 145 U. S. 123, the Court said, at page 130:

> "It is well settled in this court that, when our jurisdiction depends upon the amount in controversy, it is determined by the amount involved in the particular case, and not by any contingent loss either one of the parties may sustain by the probative effect of the judgment, however certain it may be that such loss will occur."

In *Elliott* v. *Empire Natural Gas Co.*, 4 F. (2d) 493, 500, (C. C. A. 8th, 1925) it was said:

> "It is what the appellees will directly lose in this suit that determines the jurisdictional value of the matter involved. It is not what they may lose as an indirect result of this suit."

The foregoing authorities make clear the irrelevancy of the contentions urged by respondents with respect to the potential losses which the workers of Jersey City will sustain if the respondents are not permitted to carry on the activities allegedly interrupted by the petitioners. The generality of this contention suffices to establish that there is no "direct", "pecuniary" and "calculable" subject matter involved in this litigation. The most that can be said is that if the respondents are permitted to exercise the activities purportedly secured to them by the decree of the court below, they may, perhaps, consequently have greater success in organizing particular types of labor unions in Jersey City; that if they are successful in that regard, they may realize increased revenues in the form of dues and other perquisites, and that such revenues may ultimately amount to sums exceeding the jurisdictional amount required by Section 24 (1). It needs no extended discussion to establish that such pecuniary rights, if any, contended to inhere in the activities of the respondents, are subject to every one of the characterizations made in the decided cases, to wit, "remote", "speculative", "hazy", "contingent" "indirect" and "incalculable".

Respondents seek to obscure the sharp and definitive requirements of the cases, as herein developed, with respect to the necessity of showing that the rights involved have a value calculable in money and directly affected by the litigation, by elaborating a blanket formulation of the value of civil rights generally. There is no general rule applicable in this situation with regard to the value of civil rights generally. The specific "matters in controversy" involved in this litigation must be appraised, in each of the several instances, on their own footing.

A showing of requisite jurisdictional minimum as to the causes of action for assembly and free speech in public places is not met by the citations of such cases as *Wiley* v. *Sinkler*, 179 U. S. 58 and *Nixon* v. *Herndon*, 273 U. S. 536. Those cases depended upon the well established common law action at law for damages based upon an interference with the right of a citizen to vote (a right of action cumulatively based on statute in case of federal elections). As Mr. Justice Holmes said in *Nixon* v. *Herndon, supra*, that type of cause of action for damages was well and firmly established in the common law for a period of over two hundred years. So far as presumptive jurisdictional amount is concerned, those cases are in the same category as common law actions for negligence, false imprisonment and the like, as will clearly appear from an inspection of the cases cited in the opinion of the court in *Wiley* v. *Sinkler, supra*. They were not intended, and cannot fairly be understood to stand for the broad proposition that *any* social, political or civil rights are presumably of a value in excess of $3,000.00. If that were so, there would have been no occasion for several of the other subdivisions of Section 24, such as (12) and (14), providing for dispensation with the usual jurisdictional minimum, in certain specific types of action for particular civil deprivations. Any such contention is, furthermore, rebutted by such authority as that of the case of *Smith* v. *Adams, supra*, in which no pecuniary consequence was found to be involved in a suit over the right to contest an election determining the designation of a county seat. The thesis contended for is furthermore contrary to such authority as that of *State of Ohio* v. *Cox*, 257 F. 334 (D. C. 1919). In that case, there was filed a bill to enjoin the submission of the Eighteenth Amendment to the Ohio Assembly for ratification. The bill was

dismissed on the ground that the requisite jurisdictional amount was not involved. The Court said (p. 343):

> "The jurisdiction of this court is limited to actions involving $3000., not including interest and costs. The bill alleges that the jurisdictional amount is involved. Looking at the plaintiff, or those he represents, as taxpayers, there is no allegation that any particular sum to him, or to any of them, is involved; and considering the plaintiff and those he claims to represent, *as citizens of the United States seeking to remedy a political wrong,* there is no amount of money involved." (Italics supplied.)

Nor does the case of *Truax* v. *Raich,* 239 U. S, 33, relied upon by respondents, support the view that the rights claimed to have been invaded in this case are presumptively of a value in excess of the jurisdictional requirement. The right involved in that case was that of an alien, residing in this country, to be free to pursue a livelihood without the restriction of a state statute interfering with his free employment. Jurisdiction was assumed by the court without any reference to the question as to the amount in controversy, because of the interference with rights secured by laws of the United States providing for equal rights of all persons within the jurisdiction of the United States, under the predecessor section to Judicial Code, Section 24(14), which is one of the fixed exceptions to the requirement of a showing of jurisdictional amount. The case was so understood by Judge Learned Hand; in *Marcus Brown Holding Co.* v. *Pollak,* 272 F. 137 (D. C. 1920) at page 140. The instant situation, as will be developed hereinafter, falls within none of the exceptions.

In *International News Service* v. *Associated Press*, 248 U. S. 215, likewise relied upon by respondents, the matter in controversy directly concerned the obviously tremendously valuable rights of a news service association in protecting the inviolability of its news releases from pirating by non-members. That the case directly involved a financial stake in excess of the jurisdictional amount is indicated by the reference of the court in its opinion, page 236, to rights of a pecuniary nature.

There is obviously no reasonable analogy between either of the cases thus relied upon and the rights involved in the present case. In the *International News Service* case the rights involved were sufficiently pecuniary, so far as appeared from the record before the Court. In that case, furthermore, as has been expressly pointed out by the Supreme Court in the case of *Kvos* v. *Associated Press*, 299 U. S. 269, at page 279, the answer filed did not challenge the jurisdiction. There was no assignment of error raising the question and no argument thereon was presented to the Court.

The only fairly debatable argument concerning a showing of the requisite jurisdictional minimum, made by respondents, is based upon the contention that the deprivations revolving about the molestation and physical restraint of some of the respondents by the petitioners, concern a right, which, if asserted in a common law action for false imprisonment, would presumably come within the jurisdictional minimum of Section 24(1). We put aside the obvious objections to this argument inherent in the fact that neither the prayers of the bill of complaint, nor the findings of the court, so far as any of the individual respondents in this action are concerned, have to do with any claims of false imprisonment, and

say, simply, that this Court has held; that in an action or proceeding in the federal courts, where a requirement of jurisdictional minimum is necessary, the right of freedom from unlawful incarceration is not, *per se*, a right susceptible of pecuniary valuation for jurisdictional purposes. *Kurtz* v. *Moffitt, supra*; *Barry* v. *Mercein, supra.* The rule of presumptive jurisdictional amount applies only in a technical action at law for damages for false imprisonment. See, *e. g., Hynes* v. *Briggs*, 41 F. 468. Otherwise the holdings of the Supreme Court in the *Kurtz* and *Barry* cases, *supra*, would be meaningless. Even if, however, it should be determined that the cause of action based upon detention is presumptively of a value within the jurisdictional limitation of Section 24(1), this court must reverse the judgment below so that those portions of the decree based upon the other causes of action laid in the complaint may be eliminated therefrom, for the reasons particularly discussed in subpoint (m) of this Point, hereinafter.

Respondents finally contend, in reply to the argument presently urged by petitioners, that the bill of complaint sets out a single cause of action founded upon conspiracy to deprive respondents of their civil rights generally, and that this cause of action is presumptively within the jurisdictional minimum. Any one of several answers may serve to dispose of respondents' contention in this regard. Nowhere in the complaint is there set out in cognizable form any such omnibus cause of action for conspiracy as that described. There are merely allegations concerning the adoption by petitioners of several deliberate official policies in respect of several independently formulated subjects of complaint, as for example, exclusions from the city, interferences with labor organizational activi-

ties, prevention of distribution of circulars, and denial of the right to speak in public places. The District Court Judge who presided at the trial certainly did not understand that the complaint charged a conspiracy of the nature now sought to be raised from the bill (R., p. 166). Even were such a general charge of conspiracy made in the complaint, the position taken by respondents is, in any event, frivolous in that, by the weight of authority, there is no such thing as a civil action for conspiracy, independent of the legal cause of action for damages ensuing upon the commission of the overt acts conspired. As restated in *Allen* v. *Ramsey,* 41 Pac. 2d. 658, 665 (Okl. Sup. Ct. 1935), the rule is:

> "'Accurately speaking, there is no such thing as a civil action for conspiracy. There is an action for damage caused by acts pursuant to a formed conspiracy, but none for the conspiracy alone.'"

The law on criminal conspiracy, where an indictment lies for the mere conspiracy, without regard to the unlawfulness of the objects conspired or the damage inflicted, is of course, distinguishable.

In *Hutchins* v. *Hutchins,* 7 Hill (N. Y.) 104, 107, it is said:

> "A simple conspiracy, however atrocious, unless it resulted in actual damage to the party, never was the subject of a civil action; not even when the old form of a writ of conspiracy, in its limited and most technical character, was in use."

See also *Sleeper* v. *Baker,* 22 N. D. 386; and 5 R. C. L. 1090, where the rules stated in the quoted ex-

cerpts are described as representing the weight of authority. In other cases, the *quasi* civil action for conspiracy is described as being merely an action on the case, subject to all the rules and incidents governing such an action. *Smith* v. *Rines,* 22 F. Cas. 13,100; *Doremus* v. *Hennessy,* 62 Ill. App. 391, affd. 176 Ill. 608; *Livermore* v. *Herschell,* 3 Pick. (Mass.) 33; *Jones* v. *Baker,* 7 Cow. (N. Y.) 445; *Howland* v. *Corn,* 232 F. 35; *May* v. *Wood,* 172 Mass. 11. Since the overt acts alleged to have been conspired, as for example, the denial by municipal officials of permits to meet and speak in streets, are concededly not the subject of a tort action on the case for damages, there could be no civil action for damages, within the rules set forth above, based on the supposed general conspiracy now alleged to be charged in the complaint. There, therefore, does not exist any presumption of the minimum jurisdictional amount in controversy, under the analogy of suits involving rights subject to tort actions for damages.

(c) The rights involved in this case are in no instance "secured" by the United States Constitution, and therefore that instrument does not bring them within the 14th subdivision of Judicial Code, Section 24, which dispenses with the necessity for jurisdictional amount.

(1) Meaning of "right, privilege or immunity secured", within Section 24 (14).

Respondents urge as an alternative basis for the assumption of jurisdiction over this cause by the trial court, the provisions of Judicial Code, Section 24 (14), under which a showing of jurisdictional amount is not required. The contention is untenable for a number of distinct and separate reasons. The section is as follows:

"Of all suits at law or in equity authorized by

law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity, *secured* by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

We have designedly italicized the word "secured" in the foregoing excerpt. It is settled by case authority that the word, "secured", under the subdivision, has reference to rights, privileges or immunities *created in the first instance* by the United States Constitution, and not merely rights antecedent to the Constitution in origin, but merely guaranteed by it or by one of the Amendments. It will appear upon analysis that none of the rights or alleged grievances involved in this litigation fall within the category of rights, privileges or immunities created in the first instance by the United States Constitution or the Amendments, but, on the contrary, are fundamental rights having their inception in the several states prior to the adoption of the Federal Constitution and are merely guaranteed by it, or by the Fourteenth Amendment thereto, as judicially construed, from invasion by the states. An exposition of these propositions requires a consideration of the development of these rules, which we have hereinabove described as settled, from their beginning.

In the *Slaughter House Cases*, 16 Wall. 36, it was contended that a Louisiana statute which created a corporation and gave it the exclusive privilege of maintaining slaughter houses in certain areas and

forbade their maintenance by other persons, was a violation of the privileges and immunities secured to citizens of the United States under the Fourteenth Amendment, and a determination to the contrary by the Supreme Court of Louisiana was taken on writ of error to the United States Supreme Court. The Court analyzed the right claimed to have been invaded, found that it consisted of the fundamental right of all persons to follow a vocation, and held that that right was not a privilege or immunity belonging to persons by virtue of their national citizenship, but only by virtue of their state citizenship. In distinguishing between rights pertaining to persons as citizens of a state and those which appertain to their status as citizens of the United States, the Court considered the former to embrace "those rights which are fundamental", and "nearly every civil right for the establishment and protection of which organized government is instituted". The Court held that the claimed right in question was in the category described and therefore within the sole care and protection of the states and not given over to national protection by the "privileges and immunities" clause of the Fourteenth Amendment.

The fundamental distinction thus elaborated between rights of citizens of the United States and those of citizens of the states, was further considered shortly after the decision of the *Slaughter House Cases* in *United States* v. *Cruikshank*, 92 U. S. 542, and the Court there held that the right of citizens to peaceably assemble together with each other and with other citizens of the United States was *not a right or privilege granted or secured by the Constitution or laws of the United States*, but merely a fundamental right theretofore existing and merely

further guaranteed against invasion by the states by the Fourteenth Amendment to the Constitution. The importance of this case to the point which the petitioners here make warrants a detailed consideration thereof. The subject matter of the suit was an indictment under 16 Stat. at L. 141 (Enforcement Act of May 31, 1870), which provided that "if two or more persons shall bind or conspire together * * * with intent to prevent or hinder his (any citizen's) free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States", the said conspiracy should constitute a penal offense punishable by the United States, and the particular indictment charged a conspiracy to interfere with the privilege of citizens of the United States peaceably to assemble together for peaceable purposes. As indicated, the Court held that the right of peaceable assembly was not a right "granted or secured by the Constitution or laws of the United States". The Court said, at page 554, that the due process clause of the Fourteenth Amendment—

> "* * * adds nothing to the rights of one citizen against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen * * *."
>
> "'Nor' said the Court 'did the equal protection clause of the Fourteenth Amendment add to the rights of the citizens of the States'."

The Court further said:

> "The only obligation resting upon the United States is to see that the States do not deny the right this Amendment guarantees, but nothing more."

A comparison of the language of the criminal statute involved in the *Cruikshank* case with that of Section 24 (14) will serve to indicate that the right of peaceable assembly is, *a fortiori*, not a right secured by the Constitution of the United States within Section 24 (14). As will be established more particularly hereinafter none of the other rights allegedly invaded by the petitioners in the present case fall within the purview of the privileges and immunities clause of the Fourteenth Amendment, but are, in every instance embraced either within the guarantees of Article IV, Sec. 2, or, as a result of judicial construction, within the clause of the Fourteenth Amendment involving the deprivation of "liberty" without due process of law, and, therefore, in the category of rights not "secured" by the United States Constitution, but merely guaranteed by the Fourteenth Amendment or by Article IV, Sec. 2 from state invasion. The *Cruikshank* case was specifically followed by the Supreme Court in *United States* v. *Wheeler*, 254 U. S. 281, in its construction of the word, "secured". This case is considered in detail hereinbelow.

The *Cruikshank* case was also followed by a great many decisions in the inferior courts, in one of which, *United States* v. *Lauges*, 48 F. 78 (writ of error dismissed in 144 U. S. 310), in denying that the conspiracy statute involved in the *Cruikshank* case protected the right to testify before a Federal Grand Jury without interference, the Court said (p. 87):

> "The giving and receiving of evidence as an essential and vital principle in the proceedings of all courts had been firmly established in English and American law long anterior to the adoption of the Constitution."

The first occasion that the Supreme Court had to apply the foregoing rules of differentiation of civil rights to a case in which the question of jurisdictional amount was involved, was in *Holt* v. *Indiana Manufacturing Co.*, 176 U. S. 68. In that case, the question directly considered was whether rights concededly not within the requisite jurisdictional amount in value, could be said to fall within the predecessor section to Judicial Code Section 24(14), where based upon a claimed deprivation of property without due process of law, in contravention of the Fourteenth Amendment. The Court flatly held that they could not, and there was held to be no federal jurisdiction.

The rule of the *Cruikshank* case, as particularly applied by the Supreme Court to the question of applicability of the 14th subdivision of Section 24 in the *Holt* case, has been consistently followed by the federal courts ever since.

In *Simpson* v. *Geary*, 204 F. 507 (D. C. Ariz. 1913), an action was brought by certain employees of a railroad requesting an injunction against the enforcement by the State of Arizona of a statute under which all flagmen employed by railroads were required to have been brakemen for a period of at least one year. The statute was claimed to constitute a deprivation of the plaintiffs' constitutional rights under the Federal Constitution. The jurisdictional minimum amount not being shown, it was nevertheless contended by the plaintiffs that the rights and privileges for whose deprivation the suit was brought came within the 14th exception to the requirement of such minimum in Section 24 of the Judicial Code, presently under consideration. The Court dismissed the contention and held that it had no jurisdiction.

under the authority of the *Holt* case. The Court said, at page 512:

> "The right to contract for and retain employment in a given occupation or calling is not a right secured by the Constitution of the United States, nor by any Constitution. It is primarily a natural right, and it is only when a state law regulating such employment discriminates arbitrarily against the equal right of some class of citizens of the United States, or some class of persons within its jurisdiction, as for example, on account of race or color, that the civil rights of such persons are invaded, and the Federal Constitution can be invoked to protect the individual in his employment or calling * * *"

All of the foregoing decisions were carefully analyzed by Judge Learned Hand in *Marcus Brown Holding Co.* v. *Pollak, supra,* and it was concluded by the Court that the word, "secured", as used in subdivision 14 of Judicial Code Section 24, must necessarily be accorded the connotation for which petitioners are presently contending, *i. e.,* that the reference is only to those rights which depend on the United States Constitution for their existence and not merely those in respect to which additional guaranties are afforded by the 14th Amendment. The controversy in the particular case involved an alleged deprivation of property without due process of law under the 14th Amendment. The amount in controversy was under $3,000 and the jurisdiction of the court depended upon whether the right in question could be said to fall within the classification of subdivision 14 of Judicial Code, Section 24. The Court said, page 141:

> "The plaintiffs' rights do not depend upon any law of the United States, and if subdivision

14 covers, it is by virtue of the fact that they are 'rights, privileges and immunities' 'secured' by the Constitution. Article 4, Sec. 2, had always secured to each citizen of each state the privileges and immunities of the citizens of the several states, and the second clause of the Fourteenth Amendment gave federal protection to the privileges and immunities of citizens of the United States. Just what those were the Supreme Court has been chary of saying. The right to pass freely over the whole country is apparently one. *Crandall* v. *Nevada*, 6 Wall. 36, 18 L. Ed. 745. Others are enumerated in the *Slaughter House Cases*, 16 Wall. 36, 79, 21 L. Ed. 394. Those cases, like the *Civil Rights Cases*, *supra*, hold that the general right of property does not have its origin in the Constitution and that the Fourteenth Amendment is not constitutive of them. It is in this sense that we understand subdivision 14 to use the word 'secure'. *Were it not so, all matters arising 'under the Constitution', as prescribed in subdivision 1, would be justiciable under subdivision 14, and the amount in controversy would never be a condition upon our jurisdiction, when a constitutional point was raised. This is certainly not the law.*" (Italics supplied.)

A recent decision applying the rule as outlined above, is *Gobitis* v. *Minersville School District*, 21 F. Supp. 581 (D. C. Pa. 1937), in which it was held, following *Hamilton* v. *University of California*, 293 U. S. 245, that the right of religious freedom was not a right "secured" by the Fourteenth Amendment to the Federal Constitution, but only guaranteed by that Amendment, within the "liberty" concept of the due process clause therein. Harking back to the fundamental distinctions raised in the *Slaughter House*

Cases, supra, the Court gave voice anew to the rule that the privileges and immunities protected by the Fourteenth Amendment are those that belong to citizens of the United States as such, as contrasted with those derived from other sources, and that the clear intent of subdivision 14 was limited to those rights strictly which fell within the privileges and immunities clause or other provisions of the Constitution proper.

The only expression in any case contrary to what is shown hereinabove to be the consistently applied understanding of the phrase, "rights, privileges and immunities secured", as used both in Section 24 (14) and in the criminal statute construed in the *Cruikshank* case, *supra,* is the case of *Smith* v. *United States,* 157 F. 721, 724, 725. In that case the court made the *obiter* statement that the word, "secured", in the conspiracy statute, meant, "protected", in its ordinary sense. The discussion contained in that case, however, was *a priori,* having no regard to the history and background of the concept, exemplified by the cases cited hereinabove in this subpoint. The definition given, furthermore, was not necessary to the decision. The right conspired against in that case was that of a colored citizen not to be subjected to involuntary servitude. Since that right was secured to colored persons by the 13th Amendment, in the sense of having been originally created thereby, the right was actually within the category of rights secured by the Federal Constitution, under the definition of the word "secured", shown hereinabove to be the true and authentic one.

Aside from the *Smith* case, respondents have utterly failed to meet the argument of the defendants as to the meaning of the phrase, "rights, privileges and

immunities *secured*, etc. * * *" in subsection (14). They have failed to cite a single case purporting to overrule *United States* v. *Cruikshank*, *Holt* v. *Indiana Manufacturing Company*, *United States* v. *Wheeler*, *Marcus Brown Holding Co.* v. *Pollak*, or *Gobitis* v. *Minersville School District*, all *supra*. They have done nothing more than to cite a number of lower federal court cases, in none of which, apparently, was there a thorough presentation by counsel of the argument made in this Point, nor any reference in the opinions of the courts to the authoritative decisions which we have cited bearing upon the meaning of the word "secured". Aside from those cases, the extent of the argument made by respondents is to invoke the dictionary for the meaning of the word, "secured", and to fall back upon uses of the word by the Supreme Court in cases where no problem concerning the meaning of subdivision 14 was raised. As amply demonstrated hereinabove, it is clear that the use of the word, "secured", in subdivision 14, is as a legal word of art. Resort at random to isolated instances of unadvised and casual use of the word in its ordinary grammatical meaning by the courts is obviously no aid to construction, and certainly ineffectual to overrule the *considered and settled* adjudication of the meaning of the word in the sense here immediately involved, and as here contended for by petitioners.

Respondents offer not an iota of authority in any way to affect the continued authenticity of the line of cases relied upon by petitioners. The cases they cite merely indicate that the privileges and immunities clause of the 14th Amendment, substantively considered, covers a broader and wider range of rights than was believed comprised therein at the time of the

Slaughter House Cases. See *e. g. Colgate* v. *Harvey*, 296 U. S. 404. In no respect, however, do they affect the fundamental thesis of that decision concerning the distinction between the privileges and immunities of United States citizens secured by the 14th Amendment, and such privileges and immunities as were always enjoyed by virtue of state citizenship. For this Court now to construe the word "secured", in its ordinary lay connotation, would be to nullify Section 24(1), with regard to the $3,000 requirement as to matters "arising under the Constitution and laws of the United States", and to make a completely unwarranted about-face on one of the most firmly established lines of decision in our jurisprudence. Petitioners respectfully submit that such a step, in the absence of legislation, is one which this Court should decline to take.

(2) Genesis and Nature of Rights Involved in this Case.

The law being as above indicated, it remains to consider specifically the genesis and nature of the rights allegedly involved in this case. First, there is the claimed right of peaceable assembly. This has been seen not to constitute a right secured by the Federal Constitution. *United States* v. *Cruikshank, supra;* and see *DeJonge* v. *Oregon, supra*, page 364, to the effect that:

> "* * * the right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental."

Then there are the rights of free speech (it is here conceded for the sake of argument that this right is involved, although, as argued above, the right of free speech, *qua* free speech, properly considered, is not involved in this case), the right of free press (plac-

ards, leaflets and circulars), and the right of peaceful picketing. This latter right is merely a combination of the rights of free speech and of free press. *Senn* v. *Tile Layers Protective Union,* 301 U. S. 468. Insofar as the foregoing rights are concerned, therefore, the question narrows down to the origin of the fundamental rights of free speech and of free press. It is established beyond doubt that:

> "* * * the rights of free speech and a free press were, as already said, attributes of National citizenship before the Fourteenth Amendment was made a part of the Constitution." *Patterson* v. *Colorado,* 205 U. S. 454, 464 (dissenting opinion).

The right of free speech was one of those fundamental rights brought into the American Colonies from England and antedated the adoption of the Federal Constitution. 4 *Blackstone's Commentaries,* 151. 152; 4 *Madison's Works,* page 543; *Report on the Virginia Resolutions.* The only express mention of the rights of free speech and of free press in the Federal Constitution occurs in the First Amendment and that reference is, of course, only applicable as a restriction upon the Federal Congress. The very reference to "the freedom of speech, or of the press;", in the First Amendment to the Constitution, as inviolable by the Congress, indicates that they were rights theretofore existent in the states. This conclusion is fortified by the historical fact that several of the states insisted upon the immediate adoption of the first ten amendments as a condition to their adherence to the Constitution. They desired absolute assurance that these rights, which they had always enjoyed in the states, would be kept inviolate by the new federal government. As seen above, the Supreme Court of the United States, in *DeJonge* v. *Oregon,*

supra, at page 364, considered the right involved in that case as a combination of the rights of peaceable assembly and of free speech, and applied to that combination of rights the statement of the Supreme Court in *United States* v. *Cruikshank, supra* (at p. 552), to the effect that:

> "* * * The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances."

The Court in the *DeJonge* case went on to say that the right involved was one of the fundamental liberties, at the base of all civil and political institutions, and was embodied in the due process clause of the Fourteenth Amendment. It would be as sensible for respondents to contend that the right of personal liberty secured by the Fourteenth Amendment did not exist in the states prior to the adoption of the Constitution, as to say that the adjudicated constituents of that right, to wit, freedom of speech, of press, and of assembly, did not exist in the states prior to and independent of the Federal Constitution. As indicated hereinabove, a claim for redress of the deprivation of the rights presently in question, arises under the Constitution of the United States only by virtue of the due process clause and, as held in *Holt* v. *Indiana Mfg. Co., supra,* rights dependent upon the due process clause are not such rights as are secured by the Constitution within the meaning of subdivision 14. Nor, of course, is there any basis for distinguishing between rights protected under the "liberty" concept and those covered by the "property" concept of that clause, so far as the issue of origin prior to the Federal Constitution is concerned.

The other rights with respect to which respondents claim to be aggrieved, and in reference to which an injunction was granted below, are those of freedom from unreasonable searches and seizures, from physical molestation or detention unless in pursuance of a lawful arrest accompanied by immediate arraignment, and of forcible removal or "deportation" from one state to another. So far as the Federal Constitution is concerned, it is elementary that the first two of the rights enumerated are protected by that instrument only against invasion by Congress, under the several Amendments. So far as unlawful acts in these respects by State officers are concerned, the remedies are solely and exclusively a matter of state action.

With regard to the attempt to base jurisdiction under Section 24 (14), upon the claimed "deportations" of members of the respondent organization to New York from Jersey City, as constituting deprivations of rights, privileges or immunities of United States citizens, it will suffice to say that this Court has held that the right to be immune from such deportation is *not a privilege or immunity secured to a United States citizen,* within the conspiracy statute construed by the Court in *United States* v. *Cruikshank, supra.* We refer to *United States* v. *Wheeler,* 254 U. S. 281, aff'g 254 F. 611. Of course, *state* action of the nature complained of might call for federal protection within Article IV, Section 2 of the Federal Constitution, as constituting a denial to citizens of other states of rights and privileges of citizens of New Jersey, 254 U. S. at 299; *United States* v. *Harris,* 106 U. S. 629, 645. But that consideration does not impugn the fundamental holding of the *Wheeler* case, to the effect that forcible transportation of United States citizens against their will

from one state to another is not the deprivation of a right, privilege or immunity of a United States citizen in the properly understood sense of the phrase, *i. e.*, a right created in the first instance by, and dependent for its existence at all upon the United States Constitution. As to the obvious fact that the acts of petitioners complained of in this regard are not the result of a statute, law, custom, ordinance or usage, etc. of a *state*, and for that *additional* reason not to be subsumed under the jurisdictional aegis of Section 24 (14), *vide infra*, subpoint (1).

Respondents attempted below to labor the strained thesis that another right was involved, to wit, the right of the respondent organizations and individual organizers to pursue their profession of labor organization. It has been seen from the Statement of Case hereinabove, that petitioners neither intended nor purported to interfere in any way with the professional activities of the respondents as such, and that the efforts of petitioners were at all times directed solely and exclusively to the preservation of public order in the City of Jersey City. It is also apparent without extended discussion that the incidental hobbling of some of the phases of the activities of the respondents, caused by the acts of petitioners complained of, was in no sense a prevention of the exercise of their professions, generally, by the respondent labor organizers; but even if everything that respondents contend as to the purposes of petitioners is taken at its face value, it has nevertheless been repeatedly affirmed that the right to follow a vocation, or to retain and exercise an employment in a given occupation are not rights secured by the Constitution of the United States. *United States* v. *Cruikshank, supra*; *Simpson* v. *Geary, supra*. And of persuasive importance in this connection is the

specific holding, in *United States* v. *Moore,* 129 Fed. 630, that the right of a citizen to organize miners, artisans, laborers, or persons in any pursuit, as well as the right of individuals in such callings to unite for their own improvement or advancement, or for any other lawful purpose, is not a right, privilege or immunity granted or secured by the United States Constitution, but is a fundamental right of a citizen in all free governments, and therefore within the protection of the states.

The conclusion to which one is inescapably driven, that the rights involved in the present case are, in every instance, genetic in the states and not in the federal Constitution, is fortified by a consideration of the purpose which Subdivision 14 of the Judicial Code, Section 24, was designed to accomplish. As will be more specifically developed in the next subpoint herein, the said subdivision was identical in origin with the Enforcement Act of 1870, passed by Congress to implement the newly adopted clause of the Fourteenth Amendment, which provided that:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which will abridge the privileges or immunities of citizens of the United States."

The reference to rights, privileges and immunities secured by the Constitution and by the laws of the United States providing for equal protection of citizens and persons within the jurisdiction of the United States, in Section 24 (14), is thus clearly seen to have been designed to allow original jurisdiction to the Federal District Courts, untrammeled by requisites of minimum jurisdictional amount, *in*

cases of claimed deprivation of these newly established and newly created rights, and with respect to them only.

(d) The rights involved in this case are in no instance secured by any law of the United States providing for equal rights of citizens of the United States or of all persons within the jurisdiction of the United States, and therefore no such law brings them within the alternative provisions of the Fourteenth subdivision of Judicial Code, Section 24.

Respondents contend that if they cannot come within the jurisdiction purview of subdivision 14 as claiming the deprivation of rights "secured" by the Constitution of the United States, they, nevertheless, fall within that section as claiming redress of the deprivation of rights secured by "laws of the United States". The mere statement of this proposition reveals its speciousness. Subdivision 14 does not deal with deprivations of rights secured by *any laws of the United States,* but only of rights,

> "secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

Respondents cite two laws of the United States with respect to which it is claimed a deprivation of their rights occurred. The first of these laws, or more properly speaking, group of laws, consists of those enactments commonly known as the Civil Rights Laws, originally enacted in the period 1866-1871, designed to constitute the mechanics of enforcement of the newly created rights of the negroes, won for them in the Civil War, and established as a part of the law of the land in the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of

the United States. These laws are now embodied in R. S. Secs. 2004, 1977, 1978, 1979, 18 Stat. 336, 337. R. S. Secs. 1980, 1981, 1982, 1983, 1984, 1985, 5517, 1986, 1987, 1988, 1989, 1990, and for convenience of reference, to be found in Title 8, U. S. C., Sections 31, and 41 to 56 inclusive. All of these rights revolve about Section 43 and it is that section that is primarily relied upon by the respondents. It reads as follows:

> "Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State, or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

A close examination of this section indicates that its language is almost identical in phraseology with that of Section 41(14) of Judicial Code Section 24, providing, as above indicated, for one of the classifications excepted from the requirement of a jurisdictional minimum in controversy. As a matter of fact, these sections are in *pari casu*, both having derived from the original Enforcement Act of April 20, 1871, entitled "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for other Purposes". 17 Stat. at L. 13, ch. 22. See *Holt* v. *Indiana Mfg. Co.*, *supra*, at page 72. Known from the beginning as the "Civil Rights Laws", the only purpose of Congress in enacting them was, as has hereinabove been shown, for the protection of citizens of the United States in

the enjoyment of certain rights, without discrimination on account of race, color or previous condition of servitude. *United States* v. *Cruikshank*, *supra*, at page 555.

Despite the fact that these laws were later amended and revised in unimportant particulars, they were never broadened to cover a wider range of rights than those specified in Judicial Code, Section 24(14). Today they include not only the rights of negroes, but also, for example, those of aliens discriminated against by state laws, as was the case in *Truax* v. *Raich*, *supra*.

It follows, therefore, that all of the rights and privileges based or founded upon the Civil Rights Laws are subject to the identical rules of construction and interpretation laid down by the Courts, and hereinabove detailed at length with respect to Section 24(14). The rights and grievances involved in the present proceeding, not being "secured" by the Constitution of the United States, within the judicially construed limitations of the latter section, are likewise not "secured" by its substantive counterpart, to wit, Section 43 and the related sections of Title 8, U. S. C.

Nor may the proper bounds of jurisdiction be enlarged by the reference in Section 43 of Title 8, "Constitution and Laws". The words, "and laws", must be considered as confined in intent to laws having to do with the equal rights of citizens and inhabitants of the United States, as specifically provided in Judicial Code, Section 24(14), under the rule of statutory interpretation of statutes in *pari casu*. In any event, they cannot enlarge the force and effect of Judicial Code, Section 24(14), as an excepting provision of the requirement of jurisdictional amount laid down in Section 24(1), Section

24 being the exclusive repository of provisions for the vesting of original jurisdiction in the United States district courts. Consequently, any rights which respondents may be found to have under any law of the United States *not* concerned with, "providing for equal rights of citizens of the United States and of all persons within the jurisdiction of the United States", must depend for original federal jurisdiction upon Judicial Code, Section 24(1), as being rights "arising under the Constitution or laws of the United States", and, in that event, the three thousand dollar jurisdictional minimum must be established.

Respondents' reliance upon the National Labor Relations Act is subject to the observations hereinabove made. This act is quite definitely not a law purporting to provide for "equal rights of citizens of the United States or of all persons within the jurisdiction of the United States". It is, therefore, not one of those laws in connection with which, under subdivision 14, there need be no showing of the jurisdictional minimum. It should further be noted that the class of persons in favor of which Section 24(14) allows federal jurisdiction without a showing of minimum jurisdictional amount, consists only of those persons whose rights under the law in question were affected, not those of other persons or organizations sympathetic with them, or engaged in activities designed to promote their interests. The class of persons for whose benefit the National Labor Relations Act was enacted is constituted of workers in industry. With particular application to the present controversy, that classification would be limited to workers in industry in the City of Jersey City. *No such worker was a party plaintiff in this case.* Respondents' reliance upon the Wagner Act, therefore, is for this reason, if for no other, entirely inapposite.

(e) There is no jurisdiction in this case founded upon Judicial Code, Section 24(12).

Respondents have also claimed below to rely for jurisdiction upon the 12th subdivision of Judicial Code, Sec. 24, providing for jurisdiction without regard to jurisdictional minimum, in cases of actions brought for the recovery of damages on account of any injury to person or property, or for the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in R. S. Sec. 1980 (Section 47 of Title 8, U. S. C.).

Section 24(12) concerns actions authorized by law to be maintained for the,

> "* * * recovery of damages on account of * * * the deprivation of *any right or privilege of a citizen of the United States* by any act done in furtherance of any conspiracy mentioned in Section 47 of Title 8."

R. S. Sec. 1980 (Sec. 47 of Title 8) allows an action for damages in the event that,

> "* * * two or more persons in any state or territory conspire or go in disguise on the highway or on the premises of another for the purpose of depriving, either directly or indirectly,"

any person of equal protection of the laws or of equal privileges or immunities under the laws;

> "* * * in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such a conspiracy, whereby another is injured * * * or deprived of having and exercising *any right or privilege of a citizen of*

the United States, the party so injured or deprived may have an action for the recovery of damages. * * *." (Italics supplied.)

Note that the italicized portion of the last clause qualifies the entire section. Since, as has been frequently reiterated by petitioners, no rights or privileges of citizens of the United States, as such, are involved in this case, subdivision 12 does not support the jurisdiction of the District Court any more than does subdivision 14.

The principal answer to the contention of the respondents, however, is that subdivision 12, by its very language, is limited to actions at law for damages. It cannot be said that this language is merely accidental, since, in subdivision 14, the language used is, "all suits at law *or in equity*". If Congress intended suits in equity to come within subdivision 12, they would have said so, just as they did in subdivision 14. And furthermore, it is a cardinal rule of construction of statutes vesting jurisdiction of subject matter in particular courts, that such statutes must be strictly construed. It cannot be contended that since an action at law would lie under subdivision 12, a suit in equity is permissible, under the general rule that an equity court will take jurisdiction to prevent the deprivation of rights for which there is no adequate remedy at law. Although the principle mentioned is a general equity principle, it obviously has no application to a situation where the right to an action at law is jurisdictional in the court where brought.

(f) The equal protection clause of the Fourteenth Amendment constitutes no basis for jurisdiction under subdivision 14.

Does the third clause of Section 1 of the Fourteenth Amendment, providing that no state shall deny to

persons within its jurisdiction the equal protection of the laws, create any new rights as distinguished from those in existence prior to the adoption of the Constitution, so as to constitute new rights, privileges and immunities secured, in the sense of created by, the Federal Constitution?

The answer to this question has been removed from the domain of speculation by the Supreme Court in *United States* v. *Cruikshank, supra.* In that case, the question involved was the penal statute punishing conspiracies designed to deprive a citizen of the United States of, "a privilege granted or secured to him by the Constitution or laws of the United States". (See *supra,* subpoint (c).). The indictment in that case charged such a conspiracy in that the defendants had conspired, among other things, to deprive the injured parties of "the equal protection of the laws". The Supreme Court said, page 549:

> "* * * To bring this case under the operation of the Statute, therefore, it must appear that the right, the enjoyment of which the conspirators intended to hinder or prevent, was one granted or secured by the Constitution or laws of the United States."

And at page 554:

> "The 14th Amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not * * * add anything to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. *That duty was originally as-*

> *sumed by the States; and it still remains there.* The only obligation resting upon the United States is to see that the States do not deny the right. This the Amendment guarantees, but no more." (Italics supplied.)

The language above quoted is Chief Justice Waite's.

In the Circuit Court, the opinion written by Justice Bradley, 1 Woods, 308, 314-316, said:

> "When any of these rights and privileges are secured in the Constitution of the United States only by a declaration that the State or the United States shall not violate or abridge them, *it is at once understood that they are not created or conferred by the Constitution,* but that the Constitution only guarantees that they shall not be impaired by the State, or the United States, as the case may be. The fulfillment of this guaranty by the United States is the only duty with which that government is charged * * *." (Italics supplied.)

Justice Bradley's language was cited with approval by Justice Gray, for the United States Supreme Court in *Logan* v. *United States,* 144 U. S. 263. In *Holt* v. *Indiana Mfg. Co., supra;* the Supreme Court reiterated its holding in the *Cruikshank* case and went so far as to say (at p. 72), with specific reference to the predecessor section to subdivision 14, that it did not include actions for the deprivation of rights based upon the equal protection clause of the Fourteenth Amendment.

The holding of the *Cruikshank* case has been aptly paraphrased by the Supreme Court of Maine in *State* v. *Leavitt,* 105 Me. 76, 83, as follows:

> "* * * the equality clause in the fourteenth amendment did not *create* any new or substantive

legal rights, or add to enlarge the general classification of rights of persons or things existing in any state under the laws thereof. It operated upon them as it found them established, and it declared in substance, that such as they were in each state they should be held and enjoyed alike by all persons within its jurisdiction. *Minor* v. *Happersett*, 21 Wall. 162 (22 L. Ed. 627); *U. S.* v. *Cruikshank*, 92 U. S. 542." (Italics supplied.)

The language of the *Leavitt* case has been borrowed as representing a true statement of the law on the significance of the equal protection clause, in 12 *American Jurisprudence* 132.

Respondents rely for support of their argument on equal protection, on *Truax* v. *Raich*, 239 U. S. 33. Our answer to that citation is, as has been observed above in another connection, that the reference to jurisdiction by the District Court in that case was entirely gratuitous and unnecessary, since pecuniary rights were involved, and since the matter arose on a motion by the defendants to dismiss the Bill of Complaint on four grounds *only*, which were as follows: (1) the action was a suit against the State of Arizona without its consent; (2) the bill sought an injunction against the enforcement of a criminal statute; (3) the bill did not state facts sufficient to constitute a cause of action in equity; and (4) improper joinder of parties. On the appeal to the Supreme Court, the Court described the question before it as being dependent upon the grounds urged in the motion to dismiss, and said as follows, page 42:

"The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount

to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practicable result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the states as chose to offer hospitality."

The Court at no point in its opinion adverted to any question of jurisdiction. A reading of the case indicates, however, that there actually could be said to have been jurisdiction under Judicial Code, Section 24(14), *because of the deprivation of rights of aliens under a law of the United States providing for equal rights of persons within the jurisdiction of the United States;* that since the state law was tantamount to a deprivation of the right of aliens to earn a living on an equal basis with citizens, they *were* being deprived of rights covered by subdivision 14. The case was so understood by Judge Learned Hand in *Marcus Brown Holding Co.* v. *Pollak, supra,* and he concluded that the Supreme Court in nowise meant to overrule *Holt* v. *Indiana Mfg. Co., supra,* as to the scope of subdivision 14. In any event, however, the distinction between rights and privileges of United States citizens as such, and those depending upon the equal protection clause, was definitely determined by the unambiguous and positive holding of the Supreme Court in the *Cruikshank* case, *supra.*

(g) Article IV, Section 2, of the United States Constitution does not create a basis for jurisdiction under subdivision 14.

Article IV, Section 2, provides that "the citizens of each State shall be entitled to all Privileges and

Immunities of Citizens in the several States". There is authority directly in point establishing that this provision, like the others hereinabove considered, created no new privileges and immunities of citizens of the United States under the Constitution. The privileges and immunities referred to were defined in *Corfield* v. *Coryell*, 4 Wash., (Circuit Court U. S.) 371, 380, as:

> "* * * those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have at all times been enjoyed by the citizens of the several states which compose this union."

In the *Slaughter House Cases*, 16 Wall. 36, 77, the Court said, with reference to Article IV, Section 2:

> "The constitutional provision there alluded to did not create those rights which it called privileges and immunities of citizens of the states."

As explained by the Court, it merely extended these formerly existing privileges and immunities to citizens of each of the states throughout all of the United States. It no more created rights than did the equal protection clause discussed in the subpoint next above. In both cases, merely new *relationships* were created as to existing *old* privileges and immunities *of citizens of states.*

Furthermore, as pointed out in the *Slaughter House Cases*, the substance of Article IV, Section 2, *had been* theretofore established and created in the Fourth Article of the Articles of Confederation adopted prior to the adoption of the Federal Constitution, which provided that:

> "* * * the free inhabitants of each of these

states * * * shall be entitled to all the privileges and immunities of free citizens of the several states."

These conclusions are definitely affirmed and applied in the United States Supreme Court case of *United States* v. *Wheeler, supra*, discussed hereinabove, in subpoint (c).

It is therefore clear, under the rule as phrased in *Hamilton* v. *University of California, supra,* and as applied prior thereto by Judge Hand, in the *Marcus Brown Holding Co.* case, *supra,* and later by Judge Maris in the *Gobitis* case, *supra,* that such rights as may be said to flow from Article IV, Section 2, do not "arise from the Constitution and laws of the United States as contrasted with those that spring from other sources".

(h) The alleged deprivation of the "privilege", under the Fourteenth Amendment, of passing freely from state to state does not base jurisdiction under subdivision 14.

Petitioners claim that some supposed removal of persons by the petitioners from out of the city and state constitutes a violation of that particular one of the privileges and immunities of citizens of the United States which is concerned in the right to pass freely from state to state. *Crandall* v. *Nevada,* 6 Wall. 36.

It is a complete answer to this attempt to base jurisdiction that, so far as the corporate respondents are concerned, the removal of their agents and employees who were not plaintiffs in this suit, infringes no privilege or immunity of a citizen of the United States, since a corporation has none, *Selover, Bates & Co.* v. *Walsh,* 226 U. S. 112; *Paul* v. *Virginia,* 75

U. S. 168; *Orient Insurance Co.* v. *Daggs*, 172 U. S. 557, and cannot derive any from individuals associated or connected with it, *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28, 45, and that, *so far as the individual respondents are concerned*, there is absolutely no proof in the record that any one of them was removed from out of the state.

It might be further noted that, although the *Crandall* case, *supra*, fixes the right of ingress and egress from states as an attribute of national citizenship, the right is not *peculiarly* such, since the right of ingress and egress from the states was always an attribute of state citizenship, and nothing has taken place to affect that principle. That this is so, as a matter of law, is fixed beyond any possibility of further debate by the decision of this court in *United States* v. *Wheeler*, *supra*, discussed at length hereinabove in subpoint (c). In that case, the Supreme Court referred to the reference in *Slaughter House Cases*, *supra*, at page 75, to the effect that the Fourth Article of the Articles of Confederation had enumerated as among the specific privileges and immunities of *citizens of the states*, that:

> "* * * the people of each state shall have free ingress and regress to and from any other state, * * *."

The Court in the *Slaughter House Cases* said, page 75:

> "There can be but little question that the purpose of both these provisions (*i. e.*, the 4th Article of the Articles of Confederation and Article IV, Section 2, of the Constitution) is the same, and that the privileges and immunities intended are the same in each. In the Article of Confedera-

tion we have some of these specifically mentioned, and enough, perhaps, to give some general idea of the class of civil rights meant by the phrase."

The right of free passage to and from the states is accordingly seen to be one more of the rights antecedent to the Constitution in origin and not dependent upon it for existence. The most that can be said is that the right is concurrently protected by both federal and state citizenship. In that view, the right not deriving from the Federal Constitution *peculiarly or exclusively,* no jurisdiction for an action to redress its deprivation in the District Courts can be based upon subdivision 14, authoritatively considered. *United States* v. *Wheeler, supra.*

We respectfully offer the further observation that the ejection of a person from a state because of his engaging in unlawful activities therein can hardly be said to be an abridgment of his right to pass into, from, or through the state. It is, if anything, a denial to him of the free pursuit of liberty, and perhaps of property, without due process of law, and that only. With respect to such rights, as hereinabove seen, no original jurisdiction can be founded on subdivision 14.

(i) Attempt to base jurisdiction on the Interstate Commerce Clause of the Federal Constitution, within subdivision 14.

The Interstate Commerce Clause, Article I, Section 8, Federal Constitution, gives Congress the right to regulate commerce among the several states. It obviously gives citizens no privileges or immunities as United States citizens, under subdivision 14. If respondents intend by the above citation to refer to the Interstate Commerce Act, subdivision 14 is again inapplicable since, so far as United States laws are

concerned, it deals only with rights, etc., secured by *any law of the United States providing for equal rights of citizens and persons within the jurisdiction of the United States.* It needs no extended argument to demonstrate that the Interstate Commerce Act is not within the purview of subdivision 14.

(j) So far as those respondents which are artificial entities are concerned, they have no constitutional rights, either under the "liberty" concept of the due process clause, or under the "privileges and immunities" clause of the Fourteenth Amendment, and there was therefore no jurisdiction below to enter decrees in their favor on account of the particular charges made by them, under any section of the judicial code.

Included among the parties-respondent in this case are the Committee for Industrial Organization, Steel Workers' Organizing Committee of the Committee for Industrial Organization, United Electrical Radio and Machine Workers of America, United Rubber Workers of America, and American Civil Liberties Union. These are all in the nature of membership corporations or unincorporated associations and are artificial entities.

In *Selover, Bates & Co.* v. *Walsh, supra,* it was stated, at page 126:

> "* * * it is well settled that a corporation cannot claim the protection of the clause of the Fourteenth Amendment which secures the privileges and immunities of citizens of the United States against abridgement or impairment by the law of a state."

See also *Paul* v. *Virginia* and *Orient Insurance Co.* v. *Daggs,* both *supra.*

In *Western Turf Association* v. *Greenberg,* 204 U. S. 359, the Supreme Court held that a corporation possessed no constitutional rights under that

clause of the Fourteenth Amendment protecting citizens against deprivation of their liberty without due process of law.

Nor are the cases relied upon by respondents to the contrary of this subpoint. *International News Service* v. *Associated Press*, 248 U. S. 215, did not deal with the possession by corporations of constitutional rights under either the liberty concept or the privileges and immunities clause of the Fourteenth Amendment. The corporate rights involved in that case were property rights and the constitutional basis for their protection lay under the property concept of the due process clause. The question of jurisdiction was, furthermore, not raised by the answer in that case, nor properly presented by the appeal. See *Kvos* v. *Associated Press*, 299 U. S. 269, 279. The case is therefore entirely irrelevant to the point presently urged by petitioners, which concerns only the status of corporations as parties entitled to claim the jurisdictional protection of Judicial Code, Section 24(14). The Court appears to have been concerned in the *International News Service* case only with the status of the plaintiff as a proper plaintiff from the procedural standpoint. These observations are equally applicable to the respondents' citation of *United Mine Workers of America* v. *Coronado Mining Co.*, 259 U. S. 344, except that the question there raised was with respect to a corporate party defendant.

It appears, accordingly, that whether the rights of the respondents are subject to predication upon the privileges and immunities clause of the Fourteenth Amendment or upon the due process clause (and as petitioners have shown hereinabove, the latter is the true source of respondents' rights, if

any), the corporate respondents do not enjoy the jurisdictional privilege of maintaining this action without a showing of the $3000 minimum; nor, indeed, at all, having no rights susceptible of invasion on any facts predicated in this case. To the extent that the decree of the court below runs in favor of said respondents, it must therefore be reversed and remanded. *Geneva Furniture Mfg. Co.* v. *S. Karpen & Bros.*, 238 U. S. 254.

(k) No case is made for jurisdiction under Judicial Code, Section 41(14) as to the individual respondents herein, since they never made any application for permits to speak or meet under the 1930 ordinance and therefore cannot be said to have suffered a deprivation thereunder.

None of the individuals who are respondents have shown any such interest in the controversy with respect to the 1930 ordinance regulating street meetings, as to entitle them to raise the question. There is no allegation in the complaint, and respondents have given no proof to indicate, that any one of them ever made any attempt, either to secure a permit from the city officials, or to hold a meeting on the public streets at which they would address an assemblage. None ever acted under the ordinance or in violation thereof. It has been frequently held that a party seeking to raise a question of constitutionality must show not only that a statute or ordinance is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with the public generally. *Massachusetts* v. *Mellon*, 262 U. S. 447; *Ohio Custom Garment Co.* v. *Lind*, 13 F. Supp. 533. Although respondents Macri and Carney were named as speakers in the application of the C.I.O., they themselves made

no application for a permit and made no attempt to speak without one. The other individual respondents were neither named in an application nor made any application themselves and they clearly have no interest in raising any constitutional questions which may be involved in a construction and application of the 1930 ordinance.

(1) Judicial Code, Section 24(14) deals with deprivation of certain rights under color of a statute, law, ordinance, etc. of any "State". Certain of the grievances urged by respondents were not imputable to the State of New Jersey, and do not therefore found a proper basis for the decree, to the extent that it deals with those grievances. For the same reasons, no jurisdiction can be predicated under Judicial Code, Section 24(1), dealing with controversies arising under the Constitution and laws of the United States, respondents having no substantive right to relief, to the extent that their grievances are based upon deprivations under the Fourteenth Amendment, since that Amendment is likewise limited to State action.

The bill of complaint herein is bare of any allegation that the State of New Jersey was responsible for any of the several acts complained of, or that the petitioners, in taking the steps enumerated in the bill, acted as agents of or under the authority of the State of New Jersey. It has been recently held in a similar instance that no basis for jurisdiction is predicated within Judicial Code, Section 24(14). In *Jones v. Oklahoma City*, 78 F. (2d) 860 (C. C. A. 10th, 1935), a bill was filed to enjoin the enforcement of a municipal ordinance segregating negroes and whites in separate residential districts. The bill alleged that the enforcement of the ordinance by the arrest and conviction of the plaintiffs, deprived them of their property rights and immunities and privileges, without due process of law and without the equal protection of the law, in contravention of the Fourteenth Amendment and the civil rights laws. The bill was

dismissed by the District Court for lack of jurisdiction within Judicial Code, Section 24(14). The Court said, page 861:

> "It (the bill) does not allege that the ordinance was passed and adopted by state authority or that it has been or will be enforced by any State officer, nor does it allege that the state has conferred authority or color of authority on any State officer to enforce the ordinance. * * * there is no allegation of State action in authorizing adoption of the ordinance or its enforcement.—legislative, judicial or executive."

These observations of the Tenth Circuit Court of Appeals are directly applicable to the bill of complaint filed in this cause.

In *United Mine Workers of America* v. *Chafin*, 286 F. 959 (D. C., W. Va. 1923) an action was brought to enjoin a county sheriff and his deputies from interfering with, intimidating or molesting members of the United Mine Workers of America, it being alleged that the defendants were guilty of interfering with and breaking up the efforts of the plaintiffs to organize the mine workers of a particular locality. The Court dismissed the bill for the reason that the right to relief was predicated upon a violation of the Fourteenth Amendment, which Amendment dealt only with the prohibition of acts by states, whereas in the case before the Court the acts involved were those of individuals acting entirely beyond the confines of any authority granted them by the state. The court expressly distinguished the situation before it from that involved in *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S. 278. That case involved the question whether a municipal ordinance fixing telephone rates, *under the express authority of a state statute*

authorizing the municipality to fix such rates, could, if confiscatory, be deemed an act of the state and thereby warrant an application of the due process clause of the Fourteenth Amendment. The Court held that it could. It held nothing more. Any observations indulged in by the Court, not necessary to the decision of the question as particularly circumscribed by the facts before it, is *dictum,* not presently controlling, particularly in view of inconsistent statements by the Court in other cases. A properly qualified statement of the rule, petitioners respectfully submit, is that made in the recent case of *Lovell* v. *City of Griffin, supra,* at page 450:

> "* * * municipal ordinances *adopted under state authority* constitute state action and are within the prohibition of the Amendment." (Italics supplied.)

The true confines of the Fourteenth Amendment, so far as unauthorized action by executive officers is concerned, was early stated by the Court in the case of *Virginia* v. *Rives,* 100 U. S. 313. The Court said, at page 334:

> "The inhibition (of the 14th Amendment) is in effect against passing and enforcing any laws which are designed to accomplish the ends forbidden. If an executive or judicial officer exercises power with which he is not invested by law, and does unauthorized acts, the State is not responsible for them."

In the light of this analysis as to what types of prohibited action are properly imputable to the states, and what types are not, it remains to consider some of the specific grievances claimed by the respondents in the present case.

Peaceful Picketing. Respondents have taken the position that the interference by the Jersey City police and by the petitioners generally with the right of the respondents to indulge in peaceful picketing was entirely without any justification whatsoever, either in municipal ordinances, state statute, or otherwise (R., Vol. III, pp. 1368-1369). If that is so, then respondents have amply and without possibility of contraversion established that the acts of the petitioners with respect to peaceful picketing were utterly without color of state authority and that therefore the action complained of is not imputable to the state, either under Judicial Code, Section 24 (14) or under the Fourteenth Amendment generally.

Prohibition of Street Meetings and Assemblies. In the respondents' bill of complaint it is charged, with reference to the refusal of the petitioner Casey to issue permits for street meetings upon the application of certain of the respondents, that the permits were denied, not in any bona fide application of the ordinance of Jersey City with respect thereto, but solely and purely in furtherance of an alleged fraudulent and unlawful conspiracy entered into by the individual petitioners to deprive the respondents or any of them of the right to hold street meetings under any circumstances, purely by reason of the social, economic, and political views entertained and espoused by the respondents. Fairly construed, these charges by the respondents are not tantamount to an accusation that the petitioners have denied the claimed rights of the respondents under color of any ordinance or statute. They are, to the contrary, more accurately to be characterized as charges that the petitioners, on their own initiative as individuals, arrogated to them-

selves the right to exclude from the use of the streets persons distasteful to themselves personally, entirely apart from any ordinance. Again, petitioners respectfully contend, the nature of the charge removes it from the category of grievances against state action, either direct or imputable.

Prohibition of the Use of Placards. It is true that the prohibition by the petitioners of the use of placards is founded upon a municipal ordinance. There is nothing, however, in the bill of complaint or anywhere else in the record, indicating the slightest basis in state legislation for the enactment or the administration by the petitioners of the ordinance in question. Yet again, therefore, a charge is made which is not equivalent to a charge of action by the state.

Petitioners maintain, therefore, that with respect to the charges made by the respondents in each of the instances hereinabove noted under this subpoint, no proper basis is laid for the exercise of jurisdiction by this Court under Judicial Code, Section 24(14), and that, therefore, those parts of the decree of the court below based upon the particular charges discussed herein, were without any jurisdictional basis for their entertainment by the District Court.

(m) The decree must be reversed if there was a failure of jurisdiction as to any of the separate causes of action set forth in the Bill, for any of the reasons hereinabove specified.

Petitioners have established hereinabove that there was a failure of jurisdiction in the District Court under Judicial Code, Section 24(1), by reason of the fact that there was no sufficient showing that the matters in controversy exceeded the value of $3,000. If this Court agrees, the judgment below must be reversed, unless a proper alternative case

for jurisdiction has been established by respondents under Judicial Code, Section 24(14). Petitioners have undertaken in this Point to indicate a number of reasons why no jurisdiction may be founded under that subdivision with respect to any of the causes of action alleged. With respect to some of them, furthermore, it has been shown that there is no proper basis for jurisdiction because those particular charges are not imputable to the State of New Jersey, and with respect to most of the charges, it has been shown there was no jurisdiction so far as the corporate respondents are concerned. If this court agrees with one or more of the contentions thus made by petitioners, and not with others, it must nevertheless reverse the judgment below and remand the cause so that those portions of the decree based upon the particular charges, or in favor of the particular parties, with respect to which the Court shall find that there was no jurisdiction in the District Court, may be eliminated from the injunctive provisions of the decree.

Such a step would be dictated by the decision of the Supreme Court in the case of *Geneva Furniture Manufacturing Co.* v. *S. Karpen & Brothers,* 238 U. S. 254. In that case a bill in equity was filed alleging, (1), a cause of action against the defendants for infringement of patents owned by the plaintiffs, and (2), other causes based upon a breach by the defendants of contractual obligations arising in connection with the patents. One of the defendants was a West Virginia corporation, the plaintiff a New York corporation, and the action was instituted in the Northern District of Illinois, where certain of the other corporate defendants had their headquarters. The lower courts dismissed for lack of jurisdiction on the grounds that the first cause of action was not

actually a suit for patent infringement and for the further reason that the District Court acquired no jurisdiction of the West Virginia corporate defendant, since it had not waived its jurisdictional right to be sued either in the district of the residence of the plaintiff or where it was itself domiciled. The judgment was reversed by the Supreme Court on the ground that the first cause of action, properly considered, did constitute a patent infringement suit under the laws of the United States, but so far as the part of the bill addressed to the West Virginia corporation defendant was concerned, the Court held, page 259:

> "* * * no federal court can take jurisdiction of a suit against the West Virginia corporation without its consent, save in the district of its residence or that of the plaintiff, and it hardly needs statement that *the jurisdiction as limited and fixed by Congress cannot be enlarged or extended by uniting in a single suit causes of action of which the court is without jurisdiction, with one of which it has jurisdiction.* Upon this point the rule otherwise prevailing respecting the joinder of causes in action in suits in equity must, of course, yield to the jurisdiction statute." (Italics supplied.)

If, moreover, this Court finds that the jurisdictional minimum has been established as to the causes of action based upon unlawful restraint and confinement, it may not, *ergo,* justify a retention by the district court of jurisdiction as to those causes of action where no showing of the requisite jurisdictional amount was made or is possible. It is important to note, that although the bill of complaint sets out a jumbled and undifferentiated recital of rights

claimed to have been violated, it clearly appears that the purported causes of action based upon the right of assembly and speech in the public streets are predicated upon sets of facts and rights flowing therefrom, distinctly separate and different from those based upon physical molestation, restraint, and confinement (conceding, for the sake of argument, that the bill does state the latter). Detentions took place in connection with distribution of circulars. No respondent in this case was confined in connection with public assemblies. And even if there were any such instance, the *cause of action* for the restraint is distinct from the *cause of action,* if any, involved in the claimed right to speak and assemble in public places.

Hurn v. *Oursler,* 289 U. S. 238, 246, is in direct support of the argument presently urged by petitioners. That case settled the rule of the United States Supreme Court to the effect that where separate causes of action, involving separate fundamental rights, based upon different facts, are joined in one suit, and where, in such case, the District Court has jurisdiction *over only one* of those causes of action, it is utterly powerless to deal with the other.

> "* * * The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal *ground;*

in the latter it may not do so upon the non-federal *cause of action.*" (Court's italics.)

No matter what this Court may decide, therefore, concerning the value of the rights based upon restraint and confinement in this case, it must, if respondents show no alternative ground for jurisdiction, reverse the judgment and remand the cause so that the injunctive provisions concerning the use of streets and public places for speeches and assemblies may be eliminated from the decree, since the causes of action represented by the latter provisions are entirely *separate and distinct* from those based upon physical restraint and confinement, and since, with respect to the former, there is no presumptive jurisdictional amount involved and no proof in the record thereof, as required by the ruling of the Supreme Court in *Kvos* v. *Associated Press, supra.*

As shown in Subpoint (b) under this Point, furthermore, no pretended omnibus cause of action for conspiracy to deprive respondents of their civil rights, generally, has been pleaded in the bill of complaint, nor is such a cause of action legally cognizable as a matter of general tort law. There is therefore no presumption that the matters in controversy, in such regard, have the $3000 value alleged in the bill of complaint.

(n) Petitioners have not waived lack of jurisdiction over subject matter.

Respondents finally resort to the utterly frivolous contention that petitioners, by their attorneys, conceded, prior to the trial, the existence of whatever jurisdictional facts were necessary to sustain the jurisdiction of the Court to enter an injunction, with respect to all of the issues except that relating to

the use of the streets, and, to that end, have incorporated in the record the proceedings of May 26, 1938, antecedent to the trial of the case (R., Vol. IV, pp. 83-100).

A reading of the stenographer's minutes in question will indicate that the most liberal construction of the remarks of counsel for the petitioners could reveal no more than an offer of adjustment or compromise before trial, with the suggestion that, substantively, but not jurisdictionally, the facts in the case might warrant an injunction on the so-called non-controversial points involved, other than that dealing with the use of the streets and public places, for outdoor meetings and that if the consent of the petitioners could be procured, counsel would cooperate in formulating and entering a consent decree to the extent indicated. There never was a consummation of this tentative arrangement, and the case proceeded to hearing *on all issues*, including that of jurisdiction. (See statement of Court, R., Vol. IV, p. 100.)

There is, however, no more firmly established and fundamental principle of jurisprudence than that jurisdiction over the subject matter of a legal proceeding cannot be conferred upon a court by the parties by consent or otherwise, nor can its failure be waived or overcome by an agreement of the parties. *Mitchell* v. *Maurer*, 293 U. S. 237, 247; *Grubb* v. *Public Utilities Commission*, 281 U. S. 470, 475 and *Matthews* v. *Rodgers*, 284 U. S. 521.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the final judgment and decree of injunction entered below be reversed and the bill of complaint ordered dismissed.

Respectfully submitted,

CHARLES HERSHENSTEIN,
EDWARD J. O'MARA,
JAMES A. HAMILL,
JOHN A. MATTHEWS,
MILTON B. CONFORD,
Counsel for Petitioners.

Appendix A.

"AN ORDINANCE to preserve public peace and good order, and to prevent riots, disturbances and disorderly assemblage.

The Board of Commissioners of Jersey City DO ORDAIN:

1. From and after the passage of this ordinance, no public parades or public assembly in or upon the public streets, highways, public parks or public buildings of Jersey City shall take place or be conducted until a permit shall be obtained from the Director of Public Safety.

2. The Director of Public Safety is hereby authorized and empowered to grant permits for parades and public assembly, upon application made to him at least three days prior to the proposed parade or public assembly.

3. The Director of Public Safety is hereby authorized to refuse to issue said permit when, after investigation of all of the facts and circumstances pertinent to said application, he believes it to be proper to refuse the issues thereof; provided, however, that said permit shall only be refused for the purpose of preventing riots, disturbances or disorderly assemblage.

4. Any person or persons violating any of the provisions of this ordinance shall upon conviction before a police magistrate of the City of Jersey City be punished by a fine not exceeding two hundred dollars or imprisonment in the Hudson County Jail for a period not exceeding ninety days or both.

5. This ordinance shall take effect upon its final passage.

Introduced April 1st, 1930.
Adopted April 15th, 1930.

JOHN BEGGANS,
MICHAEL I. FAGEN,
ARTHUR POTTERTON,
WILLIAM B. QUINN,
FRANK HAGUE,
Commissioners.

Dated, City Clerk's Office,
Jersey City, April 21st, 1930.

EDWARD J. HOLLAND,
City Clerk."

Appendix B.

REVISED STATUTES OF NEW JERSEY.

"40:48-1. *Ordinances: general purpose.* The governing body of every municipality may make, amend, repeal and enforce ordinances to:

* * *

Maintain order. 6. Prevent vice, drunkenness and immorality; to preserve the public peace and order; to prevent and quell riots, disturbances and disorderly assemblages;"

* * *

"40:67-1. *Ordinances relating to.* The governing body of every municipality may make, amend, repeal and enforce ordinances to:

* * *

Use of streets; * * *. c. Prescribe the time, manner in which and terms upon which persons shall exercise any privilege granted to them in the use of any street, highway, alley or public place. * * *"

Appendix C.

REVISED STATUTES OF NEW JERSEY.

"40:61-1. *General powers; acquisition of property.* The governing body of any municipality may:

Parks, playgrounds, beaches and resorts. a. Acquire, lay out, improve, embellish and maintain within and without the municipality, such public parks, squares, open spaces, playgrounds, beaches, water fronts, and places for public resort and recreation, and also streets, avenues, boulevards and parkways leading to and connecting the same, as it may deem advisable, and extend and enlarge the same, or any of them; and for such purposes, acquire, in fee or lease, estate, and by gift, devise, purchase or condemnation, any real estate improved or unimproved, or interest therein, within or without the municipality, suitable therefor;

Pavilions and other buildings. b. Construct therein and thereon pavilions, stands, shelters, and all other suitable buildings and structures, and equip the same with all suitable apparatus and furniture;

Recreation piers. c. Acquire, by lease, gift, devise, purchase or condemnation, one or more docks, wharves, or piers within the municipality to be used for public recreation, in whole or part; construct docks, wharves or piers for such purpose and use, and acquire the real estate and rights necessary therefor, by gift, devise, purchase or condemnation;

Lakes and ponds; beautify banks. d. Acquire by lease, gift, devise, purchase or condemnation, lakes, ponds, streams and other waters and the lands covered thereby, rights of flowage, and other rights therein, and the banks, and shores thereof; and con-

vert the same into public parks and places for resort and recreation; improve and embellish the same; construct dams and other means of impounding waters to create artificial lakes and ponds for places of public resort and recreation and construct suitable buildings and structures in and upon such lands.

Music: e. Provide music in the public parks, recreation grounds, and public places of the municipality;

Rules and regulations posted. f. By ordinance make and enforce rules and regulations for the government, use and policing of all such public parks, open spaces, playgrounds, beaches, water fronts and places for public resort and recreation and to provide penalties for violations thereof. All such rules and regulations shall be conspicuously posted in all places where effective;

Lease of public places. g. Lease, for any term not exceeding five years, any part of any public resort and recreation place owned by the municipality and any building thereon, or part thereof, not presently needed for such use; and

Lease of concessions; advertisement for bids; terms of lease. h. Let out and rent any privilege in any of its parks, beaches, water fronts and places for public resort and recreation, to the highest responsible bidder therefor, after advertisement of the time and place of such letting, at least ten days prior to the receipt of bids, in a newspaper circulating in the municipality, and upon such terms and conditions as it may prescribe. Upon the violation of the terms upon which any lease or privilege is granted, the same shall become void, and said governing body may so declare, and may re-enter any place so leased and prevent the exercise of the privilege so forfeited.

Appendix D.

The Revised Statutes of 1937 of the State of New Jersey, 2:63-1 and 2:63-10 provide:

"Article 1. Property Loss From Mob Violence or Riots in General.

2:63-1. Liability of City or County; Action.

When, by reason of a mob or riot, any property, real or personal, is destroyed or injured, the city in which the mob congregates or riot occurs, or, if not in a city, the county in which such property is or was situate, shall be liable to the person whose property was so destroyed or injured for the damages sustained thereby, recoverable in an action at law by or in behalf of such person."

"Article 2. Injury to Property or Person or Loss of Life From Mob Violence.

"2:63-10. Liability of City or County in Damages; Amount. Any person who, by reason of mob violence as defined and stated in sections 2:152-1 to 2:152-3 of this title, suffers material damage to his property or injury to his person shall have an action against the city in which such damage is suffered or injury inflicted, or, if not in a city, then against the county in which such damage is suffered or injury inflicted for such damages as he may sustain, to an amount not exceeding five thousand dollars."